88-575

Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND, aka GROND CONTRACTING, INC., a Hawaii corporation,

Plaintiffs-Appellees,

vs.

WILLIAM R. BURT,

Defendant-Appellant.

APPEAL FROM FINAL JUDGMENT
OF SUPREME COURT, STATE OF HAWAII

JURISDICTIONAL STATEMENT

William R. Burt
Defendant-Appellant
Pro Se
480 Hoopalua Drive
Pukalani, Hawaii 96768
(Tel.: (808) 572-1162

120
F/D

A. QUESTIONS PRESENTED FOR REVIEW

1. What are the minimum standards for compliance with 28 U.S.C. 1447(c) as to what constitutes "remand". The statute states:

> (i) "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction the district court shall remand the case." and
>
> (ii) "A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court".

and 28 U.S.C. 1446(e) states:

> "The State court shall proceed no further unless and until the case is remanded."

(2) (a) The U.S. District Court docket (A-80-82) has no entry regarding any order of remand. Merely under entry #4: "Motion to Dismiss Defendant's Petition for Removal, etc." (by Plaintiff) and under entry #23: "Order Granting

Plaintiffs' Motion to Dismiss".

(b) (i) But on May 27, 1988, the Clerk of the United States District Court (District of Hawaii) wrote a letter to the Clerk of the Supreme Court of Hawaii stating:

> "Please be advised that on May 25, 1988, this case was remanded [to] the Supreme Court, State of Hawaii. Enclosed is a certified copy of the order". (A-83)

(ii) Enclosed was a copy of the order granting Plaintiffs' motion to dismiss (no copy of any order was enclosed with the copy of the Clerk's letter sent to Defendant*).

(c) Is the Clerk's error on construing an order of dismissal to be an

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* Not until Burt travelled to Honolulu (from Island of Maui) did he discover no order of remand had, in fact, ever been issued.

order of remand an error so palpable and contrary to law that this appeal may be considered a motion to vacate, and this Court issue its order to the Supreme Court of Hawaii vacating the judgment on appeal entered by that Court on June 1, 1988 (A-1) and directing that Court's attention to controlling Federal law. All further acts by the State courts in these proceedings from the date of notice of removal (3/28/88) are coram non judice based on National Steam Ship Co. v. Tugman, 106 U.S. 118, 122 (1882).

(3) (a) What is the intent of 28 U.S.C. 1447(c):

> "The State court may thereupon proceed with such case"?

(b) Should the State court be required to reflect in its final decision interim developments in the litigation that may have taken place while the case

was in the Federal courts after removal and prior to remand?

(c) (i) After remand, a party should be permitted to bring any additional record compiled while the proceedings were subject to Federal jurisdiction back to the State court from which the cause was removed (i.e., in the present instance, the Supreme Court of Hawaii) for consideration by the State court as matters to be weighed prior to entry of the State court's final judgment.

(ii) The State record may be brought to the Federal court by certiorari (28 U.S.C. 1447(b) and this Court has noted that the Federal jurisdiction exercised on removal is original not appellate Freeman v. Bee Machine Co., 319 U.S. 448, 452 (1943), and hence, due process and

equal protection would require that the State court take cognizance of the total trial record in the Federal court and in the State court as part of the State court record upon which it renders its final decision.

(d) In the present instance, in its order filed May 31, 1988, (A-24) the Supreme Court of Hawaii relied upon Hawaii Rule of Appellate Procedure 40(e) as the basis for refusing to consider what it was in the record before the Federal court and, thus, limited its consideration to the record that existed before it prior to removal of the cause on March 28, 1988.

4. (a) The statement in the Supreme Court of Hawaii opinion filed March 8, 1988:

> ...only when one of the grounds specified in Hawaii Revised Statutes Section 658-9 and 658-10 (attached hereto as Exhibit D) is met can an arbitrators award be vacated or modified ... to do otherwise would

"nullify the legislative objective in the enactment of the arbitration and awards statute". (Underscoring added)

(b) It appears to be in direct conflict with Article VI, Clause 2 of the United States Constitution:

> Clause 2. This constitution, and the Laws of the United States which shall be made in pursuance hereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; <u>any Thing in the constitution or Laws</u> of the State to the contrary notwithstanding. (Underscoring added)

(c) Particularly when the issues raised by Defendant before the Hawaii Supreme Court involved denial of due process and equal protection (A-39) protected by the Fourteenth Amendment to the United States Constitution.

(The facts underlying the constitutional issues are set forth in Appendix pages 31-

33, 36-42,47-52, 55-60). They cover actions such as failure to name an indispensable party as co-defendant (A-55-57 and 59), absence of contract obligation to arbitration (A-59), failure of arbitrators to comply with submission order (A-51-52), 5 1/2 years delay in commencing arbitration (A-66). All of these are not part of grounds specified by HRS 658-9 or 10 (A-17-18) and, hence, are not protected by Hawaii courts).

(d) And the record before the Federal District Court between March 28, 1988 and May 31, 1988 disclosed fraud, mistake and conspiracy (A-45-52) which had not been considered previously in the State court proceedings. In Re Sun Valley Food Co., 801 F.2d 186, 189 (CA 6, 1986) points out that the above issues are bases for collateral attack on the State court

judgment when they have served to procure the judgment, as in the present case.

B. ALL PARTIES ARE LISTED IN THE CAPTION.

C. TABLE OF CONTENTS.

D. OFFICIAL OPINIONS AND CHALLENGED ORDERS SET FORTH IN FULL IN APPENDIX (A-1-27).

C. TABLE OF CONTENTS

A.	QUESTIONS PRESENTED FOR REVIEW	1
B.	LIST OF ALL PARTIES	7A
C.	TABLE OF AUTHORITIES	ii-vi
D.	OPINIONS BELOW	7A
E.	GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED	8
F.	CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED (Texts in Appendix)	10
G.	STATEMENT OF THE CASE	11
H.	REASONS WHY QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION	19
I.	APPENDIX (WITH INDEX TO APPENDICES)(INDEX LOCATED IMMEDIATELY AHEAD OF PAGE A-1)	vii-viii

TABLE OF AUTHORITIES

1. CASES	PAGES
Allman v. Hanley, 302 F.2d 559 (CA 5, 1962)	10
Ass'n of Owners of Kukui Plaza v. Swinerton, 705 P.2d 23 (Haw. 1985)	23
California v. Greenwood, 56 L.W. 4409 (1988)	24
Cetta v. Delaware Valley Hospital, 313 F.Supp. 301 (ED Pa. 1970)	24
Dakota v. Neville, 459 U.S. 553 (1983)	19
Delaware v. Prouss, 440 U.S. 648 (1979)	19
E.D. Systems Corp. v. Southwestern Bell Tel., 674 F.2d 453 (CA 5, 1982)	9
Freeman v. Bee Machine Co., 319 U.S. 448 (1943)	4, 26 27
Goldberg v. Kelly, 397 U.S. 254 (1970)	28, 29
Griffin v. Breckenridge, 403 U.S. 88 (1971)	22

Cases-continued	Pages
In Re Sun Valley Food Co., 801 F.2d 186 (CA 6, 1986)	7
Johnson v. Estelle, 625 F.2d 75(CA 5, 1980)	25
Lewis v. United Assoc. Pipe Line Co., 194 F.2d 1005 (CA 5, 1952)	25
Little v. Streater, 452 U.S. 1 (1980)	23
Matthewman v. Akane, 574 F.Supp. 1510 (DC Haw. 1983)	22
Michigan v. Long, 463 U.S. 1032 (1983)	20, 21
Monroe v. Pape, 365 U.S. 167 (1961)	21, 22
National Steam Ship Co. v. Tugman, 106 U.S. 118 (1882)	3, 9
Orr v. Orr, 440 U.S. 268 (1979)	10
Pennzoil v. Texaco, 55 L.W. 4457 (4/6/87)	28
Pfaeltzer v. Patterson, 49 Haw. 59, 410 P.2d 974 (1966)	22, 23

Cases-continued	Pages
Rubin v. Baltimore and Ohio Ry. Co., 324 F.Supp. 204 (E.D. Penn. 1971)	27
Silva v. Vowell, 621 F.2d 640 (CA 5, 1980)	18, 25
Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815 (CA 9, 1985)	26
U.S. ex rel Eschevarria v. Silberglitt, 441 F.2d 225 (CA 2, 1971)	9
Waco v. U.S. Fidelity, 293 U.S. 140 (1934)	27
Woodward v. Overmyer, 428 F.2d 880 (CA 2, 1980)	27
2. United States Constitution	
a. Art. IV, Clause 2	6, 10, 17
b. Fourteenth Amendment	6, 10, 12, 17 19, 20 21, 22 24
3. United States Statutes	
a. 28 USC 1257(2)	10, 17
b. 28 USC 1331	18

United States Statutes - continued

c.	28 USC 1441-1452	26
d.	28 USC 1441(b)	18
e.	28 USC 1443	15
f.	28 USC 1446(e)	1, 29
g.	28 USC 1447(b)	4
h.	28 USC 1447(c)	1, 3, 9, 24 25, 28, 29
i.	28 USC 1447(d)	15
j.	28 USC 1654	15
k.	28 USC 2103	10
l.	42 USC 1981, et seq (Civil Rights Act)	24
m.	42 USC 1983	25

4. Hawaii State Constitution

Art. 1, Sec. 5	21

5. Hawaii Rules of Appellate Procedure

Rule 40(e)	5

6. Hawaii Revised Statues

Sections	
658-1	23
658-9	5, 12 24
658-10	5, 12
658-11	23
659-9	17

7. Text and Articles

a. "Moore's Federal Practice"

Vol. 1A 9
"Removal"
paragraph 0.169 25
paragraph 0.168[4.-1] 26

b. "Laws of Federal Courts" Wright (West 1983)
p. 237, fn. 19 26

c. "Federal Practice & Procedure", Wright & Miller (1985)

Vol. 14A
Section 3739 "Remand"
p. 585 26

d. "Federal Proc. L.Ed."

Removal, Sec. 69.123 27

E. (1) NATURE OF PROCEEDINGS

(i) This is an appeal from a judgment on appeal entered by the Supreme Court of Hawaii based on an appeal from the State's Second Circuit Court of the lower court's order confirming an arbitration award. The Hawaii Supreme Court affirmed the lower court's order.

(ii) The judgment appealed from was entered June 1, 1988, and the notice of appeal was served by mail on August 2, 1988, and filed in the Supreme Court of Hawaii on August 8, 1988*.

By order of this Court (#A88-122) dated August 22, 1988, the time for filing the jurisdictional statement was extended to include September 29, 1988.

As this Court was advised by Appellant's motion filed September 12,

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* (transposition error corrected by amendment served September 19, 1988)

1988, and denied September 15, 1988 (A88-122), Appellant has pending in the Court of Appeals for the Ninth Circuit (#88-2806 filed August 11, 1988), a "Motion for Reconsideration" of that Court's order of July 28, 1988, stating that it was without jurisdiction based on 28 U.S.C. Section 1447(c) (remand). If Appellant prevails on the motion for reconsideration, then under National Steam Ship Co. v. Tugman, 106 U.S. 118, 122 (1882), the judgment appealed from herein will be coram non judice and, hence, void.

Quoted in E.D. Systems Corp. v. Southwestern Bell Tel., 674 F.2d 453, 457-458 (CA 5, 1982). Also, see Vol. 1A of "Moore's Federal Practice and" re "Removal" at pages 627-628, citing U.S. ex rel Echevarria v. Silberglitt, 441 F.2d 225, 227 (CA 2, 1971).

And see Allman v. Hanley, 302 F.2d 559, 562 (CA 5, 1962), stating that the State judgment is void.

(iii) This Court has jurisdiction under 28 U.S.C. 1257(2) and 2103:

Orr v. Orr, 440 U.S. 268, 274 (1979).

F. CONSTITUTIONAL PROVISIONS INVOLVED.

Article VI, Clause 2

Clause 2. SUPREME LAW OF THE LAND.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Underscoring added)

Amendment XIV.--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;...

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

G. STATEMENT OF THE CASE

Upon being confronted by the statement in the Memorandum Opinion

(quoted pages 5 and 6, supra) that the only grounds for vacating or modifying an award were those found in H.R.S. Sections 658-9 and 658-10 (provisions set forth in A-17 and A-18), Defendant culled the record before the Supreme Court of Hawaii (which included the record before the Second Circuit Court) to pick out the activities and rulings that were violative of Defendant's rights under the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution and presented them in a "Motion for Reconsideration" filed March 16, 1988 (copy is A-31-33).

The order filed March 18, 1988, the Supreme Court of Hawaii states: "The Motion for Reconsideration filed on March 16, 1988 is denied without argument". (A-22-23).

Again, on May 25, 1988, Burt filed a "Request for Imposing Conditions" in connection with his counsel's (Raffetto's) "Motion for Withdrawal of Counsel". Burt's documentation included a copy of the "Memorandum in Support of Defendant's Motion for Partial Summary Judgment" filed in the USDC-Hawaii after removal. The motion to withdraw was denied by the Supreme Court of Hawaii on May 25, 1988, for lack of jurisdiction based on removal.

When Burt received his copy of the letter dated May 27, 1988 (A-83) from the Clerk USDC-Hawaii to the Clerk, Supreme Court, State of Hawaii, no copy of the order referred to in the text was enclosed, so Burt relied upon the text of the letter stating "on May 25, 1988, this case was remanded to the Supreme Court,

State of Hawaii", and assumed an order of remand had been issued sua sponte by the Court (subsequently proven false). Burt thereupon assumed the Hawaii supreme Court had resumed jurisdiction and he filed a "Motion for Reconsideration of Order of May 25, 1988" in the Supreme Court of Hawaii (copy A-34-71) setting forth in the motion and its Exhibits 1-3 the full scope of the constitutional issues raised herein (as well as the fraud and mistake issues (A-47-52) that had been entered on the record during the pendency of the proceedings in USDC-Hawaii) (see in particular page 4 (A-58) of its Exhibit 3, quoting the portion of the Supreme Court of Hawaii's Memorandum Opinion quoted at page 5 and 6, supra herein).

The "Motion for Reconsideration" was denied by the order of the Supreme

Court of Hawaii dated May 31, 1988 (A-24-25) which ignored Burt's rights under 28 U.S.C. 1654 to represent himself in the action which was being remanded from the Federal Court.

Thereafter, the Supreme Court of Hawaii entered its Judgment on Appeal on June 1, 1988 (A-1) and remanded the proceedings to Hawaii's Second Circuit Court.

On May 31, 1988, Burt filed a Notice of Appeal to the Ninth Circuit Court of Appeals, under 28 U.S.C. 1443 and 1447(d), assuming the Clerk's letter was correct and that an order of remand had been issued.

On June 6, 1988, Burt filed an Amended Notice of Appeal when he discovered from the records in the Clerk's office (USDC-Hawaii) that, in fact, no order of remand had ever been entered.

By June 6, 1988, Burt filed a "Motion for Jurisdiction" with the Supreme Court of Hawaii with copy to the Second Circuit Court pointing out that there was no order of remand and, hence, neither the Supreme Court nor the Second Circuit Court of Hawaii had any jurisdiction. On June 15, 1988, Burt filed an additional document with the Supreme Court of Hawaii, a "Motion for Reconsideration" (A-72) which had attached a copy of the USDC-Hawaii Clerk's docket sheets (A-80-82) proving that no order of remand had ever been issued and, hence, the Hawaii courts lacked further jurisdiction in the cause. The motion was denied by order dated June 15, 1988. (A-26).

As stated above, the Supreme Court of Hawaii's denial of reconsideration entered March 18, 1988 (A-22) and order of May 31, 1988 (A-24)

specifically and effectively denied Burt constitutional rights protected by the Fourteenth Amendment (and Article VI, Clause 2) and they asserted the Supreme Court of Hawaii's interpretation and application of H.R.S. Section 659-9 (A-17-18) as controlling even though thus rendered repugnant to the United States Constitution (hence 28 U.S.C. 1257(2) applies).

Plaintiffs' counsel made clear to USDC-Hawaii at the hearing on May 9, 1988, that they had filed only a motion to dismiss:

> Your Honor, the papers that we have submitted in support of the motion to dismiss adequately set forth the appropriate case law in this case; and we are confident that it supports our position to dismiss this matter. Alternatively, your Honor, we ask the Court to remand this matter back to the State Court, so that the plaintiffs can pursue collection on their judgment against Mr. Burt for the amounts owing to them pursuant to the contract, the

construction contract entered between them. (Underscoring added)

And, at the same hearing, conceded Federal jurisdiction under 28 U.S.C. 1331* and the right to removal under 28 U.S.C. 1441(b) on one of the Fourteenth Amendment issues:

> "Mr. Yuen (counsel for Plaintiff): On that motion for reconsideration (i.e., before the Supreme Court of Hawaii), Mr. Burt raised the issue as to whether Mrs. Burt was denied due process, whether she should have been an indispensable party to the contract. The court did not even address that; it did not even consider the argument. The Court: Isn't that why he's here?"

Silva v. Vowell, 621F.2d 640, 646-647 (CA 5, 1980) which analyzes various Supreme Court opinions considered controlling and concludes "a federal court has jurisdictin unless a constitutional claim is wholly insubstantial".

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* Over $100,000 in issue, thus exceeds jurisdictional minimum.

H. STATEMENT OF REASONS WHY QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION:

(1) Issues that arise under the Fourteenth Amendment are analyzed as follows:

(a) Of necessity the Hawaii Supreme Court's "Memorandum Opinion" had to pass on both state and federal questions because there was raised before it simultaneously the denial of due process and equal protection under the State Constitution (Art 1, Sec. 5) and the Fourteenth Amendment of the United States Constitution. It could not pass on the State issue without simultaneously passing on the Federal issue. Delaware v. Prouss, 440 U.S. 648, 652-55 (1979) and South Dakota v. Neville, 459 U.S. 553, 556, fn. 5 (1983).

(b) There is no express

statement in the "Memorandum Opinion" that the decision rests solely and independently on state grounds. Michigan v. Long, 463 U.S. 1032, 1038 and 1041 (1983).

(c) The "Motion for Reconsideration" (A-31-33) filed before the Hawaii Supreme Court requested reconsideration based on the requirements of the Fourteenth Amendment, and the Court's order (A-22) denying reconsideration states it was denied without oral argument and makes no claim that the "Memorandum Opinion" (A-2-21) was based solely and independently on state grounds. Michigan, supra, p. 1041.

(d) The official edition of the Hawaii Revised Statutes incorporates the annotations under the United

States Fourteenth Amendment as additional annotations to Article I, Section 5 (p. 100) of the Hawaii Constitution. So there is a question of whether or not Federal decisions have been properly interpreted. Michigan, supra, p. 1043, fn. 8.

2. The Hawaii Courts are more concerned with maintaining the Plaintiffs' state rights acquired by arbitration than in exploring any deprivation of Defendants' rights protected by the United States Constitution.

The Hawaii Court priorities are the reverse of the Federal courts' responsibilities which consider that deprivation of a constitutional right is more serious than a violation of a state right. Monroe v. Pape, 365

U.S. 167, 196 (1961); Matthewman v. Akane, 574 F.Supp. 1510, 1515 (DC Haw. 1983).

3. Because of the Hawaii courts' bias in favor of winners under arbitration, Defendant, as a member of the class of "losers", has been denied the equal protection of the laws protected by the Fourteenth Amendment, "a class-based animus" noted in Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

4. (a) When Defendant was before the Second Circuit Court in this action, Pfaeltzer v. Patterson, 49 Haw. 59, 60, 410 P.2d 974 (1966), precluded interlocutory appeals, so there was no procedure for errors by the Circuit Court in applying and invoking arbitration in the first

instance under H.R.S., Section 658-1 to be subject to Court review unil opportunity supposedly arose under H.R.S., Section 658-11 re "Notice of Motion to Vacate, Modify or Correct; Stay". Reversal of Pfaeltzer by Ass'n of Owners of Kukui Plaza v. Swinerton, 705 P.2d 28, 35 (Haw. 1985) came as too late and too little to help Defendant (per opinion quoted pp.5-6, supra). Defendant is still entitled to protection under the United States Constitution even though Pfaeltzer has been superseded. Little v. Streater, 452 U.S. 1, 16 (1980).

(b) Interlocutory appeal on issues of due process and equal protection at the inception of the arbitration proceedings would have permitted certain of the

Fourteenth Amendment issues to be resolved before their exclusion as the result of the manner in which Hawaii Supreme Court interprets HRS, Section 658-9 (pp. 5-6, supra).

4. The State may have higher standards under its Constitution, but not lower than those required by the Fourteenth Amendment. It must meet minimum Federal standards. California v. Greenwood, 56 L.W. 4409, 4411 (1988).

5. The Civil Rights Act, 42 U.S.C. 1981, et seq., was enacted in furtherance of the objectives of the Fourteenth Amendment, both due process and equal protection. Cetta v. Delaware Valley Hospital, 313 F.Supp. 301, 308 (ED Pa. 1970).

The pages of the Appendix 31-33, 36-42, 47-52, and 55-60 spell out details

of what constitutes a cause of action for Defendant under 42 U.S.C. 1983 and confirm that the Federal Court had jurisdiction. Silva v. Vowell, supra.

6. These proceedings will permit this Court to lay down rules applicable to establish minimum standards for meeting the remand requirements of 28 U.S.C. 1447(c). See Lewis v. United Assoc. Pipe Line Co., 194 F.2d 1005, 1006 (CA 5, 1952), and Johnson v. Estelle, 625 F.2d 75, 78 (CA 5, 1980). In those cases at least the court intended to remand and was not merely granting plaintiffs' motion to dismiss, as in the present case. To dismiss is not to remand. See Vol. 1A "Moore's Federal Practice", paragraph 0.169, "Remand or Dismissal", pp. 675-685 and p. 649 "dismissal involves an act of power when the Federal court has subject

matter jurisdiction". Paragraph 0.168[4.-1].

7. The basic precept is that the District Courts should be cautious about exercising the power to remand, particularly when the removal involves the invoking of protection under the United States Constitution. See "Law of Federal Courts" Wright (West 1983) at page 237, fn. 19. And see 14A, "Federal Practice & Procedure", Wright-Miller (1985) "Remand", Section 3739, p. 585.

8. In Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815, 818 (CA 9, 1985), the Circuit Court expresses a preference against removal that is contrary to the legislative intent expressed in 28 U.S.C. Sections 1441-1452 and contrary to the liberal amendment provisions of Freeman v. Bee Machine Co.,

319 U.S. 448, 452 (1943). There is conflict on this issue amongst the circuits. Woodward v. Overmyer, 428 F.2d 880, 882-883 (CA 2, 1980). See 29 "Federal Proc. L.Ed.", "Removal", Section 69:123, "Waiver by non-removing party" and Rubin v. Baltimore and Ohio Ry. Co., 324 F.Supp. 204, 205 (E.D. Penn., 1971).

9. This Court has the power to review the order of dismissal. Waco v. U.S. Fidelity, 293 U.S. 140, 143 (1934).

10. Further, this may be a case of first impression establishing a precedent for the status of the Federal proceedings when they are remanded to the State court. What accommodation must the State court accord the record compiled while the proceedings were subject to Federal jurisdiction?

11. Some standard should be established for 28 U.S.C. 1447(c)'s statement "The State court may thereupon proceed with such case".

12. Is not the litigant denied due process and equal protection if the State court completely ignores the record compiled while the case was within the Federal jurisdiction (i.e., after removal and prior to remand)? The final decision should be based on the total record. Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

13. How is Pennzoil v. Texaco, 55 L.W. 4457 (4/6/87) to be implemented if the State court declines to reopen the record before it upon remand or otherwise so that the State court may pass on the issues revealed for the first time during the course of proceedings in the Federal

court. It should be recognized as an element of due process that the State court reopen the proceedings to receive the additional record. Goldberg v. Kelly, supra at p. 271.

PRAYER

Based on the foregoing reasons stated hereinabove, it is respectfully prayed that this appeal be heard from the final judgment and related orders of the Supreme Court of Hawaii; or summarily issue an order vacating the judgment on appeal entered by the Supreme Court of Hawaii on June 1, 1988 (A-1) as violative of 28 U.S.C. 1446(e) in the absence of any order of remand as required by 28 U.S.C. 1447(c).

DATED: Pukalani, Maui, Hawaii,

September 28, 1988.

WILLIAM R. BURT

Appellant Pro Se

PROOF OF SERVICE

I, William R. Burt, a member of the Bar of the United States Supreme Court, Defendant-Appellant Pro Se, hereby certifies that all parties required to be served have been served in compliance with Supreme Court Rule 28.3, by depositing a copy of the foregoing document in a United States Post Office, First Class, postage prepaid, addressed to the counsel of record at his post office address listed as follows:

JAMES KRUEGER
KEVIN H.S. YUEN
2065 Main Street
P. O. Box T
Wailuku HI 96793

on this 29th day of September, 1988.

WILLIAM R. BURT
Defendant-Appellant Pro Se

INDEX TO APPENDICES

1.	Judgment on Appeal - dated June 1, 1988	A-1
2.	Memorandum Opinion - dated March 8, 1988	A-2-21
3.	Order Denying Motion for Reconsideration - dated March 18, 1988	A-22-23
4.	Order - dated May 31, 1988	A-24-25
5.	Order - dated June 15, 1988	A-26-27
6.	Order on Plaintiffs' Motion to Dismiss Petition for Removal of Civil No. 5300(2) from the Supreme Court of Hawaii to the U.S. Federal District Court for the District of Hawaii - dated May 23, 1988	A-28-30
7.	Motion for Reconsideration - dated March 16, 1988	A-31-33
8.	Motion for Reconsideration of Order of May 25, 1988, Pursuant to HRAP Rule 40 - dated May 31, 1988	A-34-71
9.	Motion for Reconsideration of Order with Two Enclosures - filed June 15, 1988	A-72-82

10. Letter from USDC-Hawaii Clerk to Clerk, Supreme Court, State of Hawaii - dated May 27, 1988 A-83

11. Notice of Appeal - filed August 8, 1988 A-84-86

NO. 12259

IN THE SUPREME COURT OF THE
STATE OF HAWAII
FILED JUNE 1, 1988

JUDGMENT ON APPEAL

Pursuant to Memorandum Opinion of the Supreme Court, State of Hawaii, entered herein on March 8, 1988, the Judgment of the lower court entered May 13, 1987 is affirmed.

DATED: Honolulu, Hawaii, June 1, 1988.

BY THE COURT:

/s/ Eugene L. Sabada
Of Clerk

APPROVED:

/s/ Edward H. Nakamura
Associate Justice

NO. 12259

IN THE SUPREME COURT OF THE
STATE OF HAWAII

Filed March 8, 1988

MAUI ARCHITECTURAL, GROUP, INC., A Hawaii Corporation KONRAD GROND, dba KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii Plaintiffs, vs. WILLIAM R. BURT, Defendant.	CIVIL NO. 5300(2) APPEAL FROM: (1) ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION FILED OCTOBER 14, 1982; (2) ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; (3) ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE MODIFY OR CORRECT ARBITRATION AWARD, FILED JUNE 1, 1987; (4) ORDER DENYING

) DEFENDANT'S MOTION
) FOR DISQUALIFICA-
) TION AND DENYING
) DEFENDANT'S MOTION
) TO AMEND PLEADINGS
) TO INCLUDE ADDI-
) TIONAL COUNTERCLAIM
) UNDER RULES 59(a)
) AND 59(e) OF THE
) HAWAII RULES OF
) CIVIL PROCEDURE AND
) STAY UNDER SECTION
) 641-(c) OF THE
) HAWAII REVISED
) STATUTES, FILED
) JUNE 24, 1987
)
) SECOND CIRCUIT
) COURT
)
) HONORABLE ARTHUR T.
) UEOKA and RICHARD
) R. KOMO JUDGES
)

MEMORANDUM OPINION

Defendant-appellant William R. Burt appeals from the order of the Circuit Court of the Second Circuit granting the motion for a stay of proceedings pending arbitration filed by Plaintiffs-appellees Maui Architectural Group, Inc. (MAG) and

Konrad Grond Contracting (Grond) and from the subsequent order of the court confirming the arbitration award.[1] The defendant-appellant argues, inter alia, that the circuit court should not have entertained the motion to stay proceedings in view of the plaintiffs-appellees' default in seeking arbitration, and the plaintiffs-appellees argue the

[1] More specifically, Burt appeals from the following: (1) Order Granting Plaintiff's Motion to Stay Proceedings Pending Arbitration, filed October 14, 1982; (2) Order Confirming American Arbitration Award; Entry of Judgment and Judgment, filed May 13, 1987; (3) Order Denying Motion for Reconsideration of Denial of Defendant's Motion Under Section 658-8, H.R.S., to Vacate, Modify or Correct American Arbitration Award, filed June 1, 1987; and (4) Order Denying Defendant's Motion for Disqualification and Denying Defendant's Motion to Amend Pleadings, filed June 24, 1987.

defendant-appellant's notice of appeal was untimely. We resolve these threshold questions in favor of arbitrability and appealability; and after reviewing the record we affirm the circuit court's confirmation of the award.

I.

On December 19, 1978, Burt entered into a contract with MAG for the preparation of architectural plans for a "residence and garage" in the Kula 200 subdivision, Kula, Maui, agreeing to pay MAG twelve percent of the construction costs for its services. On July 9, 1979, Burt entered into two separate construction contracts with Grond dated July 9, 1979 and July 10, 1979.[2/] Under the contract dated July 9, 1979, Burt "agree[d] to pay [Grond] the sum of

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2/ The fact that two contracts were executed is of no consequence in this appeal.

$192,000.00." The contract dated July 10, 1979, however, provided that Burt would "pay [Grond] the sum of material and labor plus 10% profit." Paragraph 9.1 of the contract between Burt and MAG read:

> All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.

The contracts between Burt and Grond also provided that disputes arising thereunder were "subject to arbitration".

Grond constructed a home for Burt "[p]ursuant to [MAG's] drawings, plans, and specifications." It submitted a bill for $253,928.85, but Burt paid the contractor only $171,657.64. On May 4, 1981 the plaintiffs filed a complaint

against Burt, alleging they "provided valuable work, labor, materials and effort to" Burt who wrongful[ly] refus[ed] to pay." They prayed for "such sums of money and damages as are owed . . . to the plaintiffs."

Burt responded on May 27, 1981, denying plaintiffs' allegation that he wrongfully refused to pay and asserting a multitude of defenses. He also brought a counterclaim against the plaintiffs, alleging causes of action for "Breach of Contract by Architect," "Negligence of Architect," "Negligent Infliction of Mental Distress by Architect," "Breach of Contract by Contractor," "Negligent Construction by Contractor," "Fraud and Conspiracy of Architect and Contractor," "Unfair and Deceptive Acts or Practices in the Conduct of a Trade or Business by

Architect and Contractor," and "Willful Misconduct and Punitive Damages"3/ and seeking special, general, and punitive damages, fees and costs, and "such other and further relief as the [c]ourt may deem to be just."

3/ Burt's counterclaim alleged, inter alia, that MAG "fail[ed] to prepare change orders for alterations in construction of [his] home," "failed to timely advise [him] or [the] acts of [Grond] and cost overruns by [Grond]," and that MAG's "negligent conduct has caused [him[great mental distress." Grond, Burt averred, "fail[ed] to construct [his] home in conformity with the contract plans" and "negligently performed the construction work." Furthermore, Burt contended "[p]plaintiffs acted in concert and conspired together in the misrepresentation of material facts concerning the progress and cost of the construction of [his] home"; such actions "constitute unfair and deceptive acts in the conduct of a trade or business," and the breach of contract by plaintiffs was "willful and . . . for the purpose of economically oppressing . . . and cheating him."

Plaintiffs moved for a stay of proceedings pending arbitration on July 8, 1981. Claiming a firm trial date was not available "until April or May . . . next year," they maintained that "this matter [could be] resolved in the next few months" by arbitration. Burt argued in opposition that the plaintiffs' commencement of "legal action without in any way insisting upon their right to arbitration or taking any steps to preserve that right[]" and their claim of such right "after a delay of fourteen months . . . preclude [p]laintiffs' attempt to enforce arbitration." The motion was herd and a stay was orally granted on September 30, 1982. Burt sought permission to seek interlocutory appellate review of the stay order, but his request was denied. And on October

14, 1982, the circuit court entered an order staying proceedings in court and directing that "all issues raised by the pleadings herein to date" be resolved through arbitration.

Arbitration commenced on January 5, 1987. Three days of hearings followed on January 6, 7, and 19, 1987. On March 27, 1987, the arbitrators, "having duly heard the proofs and allegations of the parties," concluded Burt owed the contractor $73,275 more than he paid plus $8,000 in attorney's fees. The arbitrators also concluded Burt owed MAG $11,325.

Plaintiffs moved to confirm the award on April 9, 1987. Two weeks later, Burt moved to have the award vacated or modified. The plaintiffs' motion was granted; Burt was denied. Reconsideration

of the denial of the motion to vacate or modify the award was denied too. On May 13, 1987, the trial court after "having considered the papers and pleadings on file" entered the written order confirming the arbitration award. On May 19, 1987, Burt moved to amend the pleadings filed earlier in the court and to stay enforcement of the award. The court denied the motion and this appeal followed.

II.

We begin our analysis of the issues posed on appeal by considering whether the appeal from the circuit court's order granting plaintiffs' stay of proceedings pending arbitration is timely. Citing Barthrop v. Kona Coffee Co., 10 Haw. 398, 401 (1896); Mackenzie v. Choi, 47 Haw. 298, 302-03, 387 P.2d 475, 477-78 (1963);

Gomes v. Heirs of Kauwe, 52 Haw. 126, 126-27, 472 P.2d 119, 119-20 (1970); and Association of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. ____, ____, 705 P.2d 28, 35 (1985), the plaintiffs argue the order entered on October 14, 1982 was a final and appealable order for which leave to appeal was not necessary. And since Burt failed to file a notice of appeal from the entry of the order within thirty days, they contend the order is now not appealable.[4/] We cannot agree.[5/]

[4/] Hawaii Rules of Civil Procedure (HRCP) Rule 76(b) reads: "[N]otice of appeal shall be filed in the circuit court within 30 days after the person desiring to appeal is notified of the rendering or entry of the decision or order, or of the action taken, in the manner provided by statute."

[5/] The plaintiffs do not argue in their brief that the defendant's appeal was untimely under our ruling in Salud v. Financial Security Ins. Co., 69 Haw. ____, 745 P.2d 290 (1987). An

In Swinerton we said "orders granting stays and compelling arbitration are appealable." Id. But on October 14, 1982, when the trial court stayed proceedings pending arbitration, the prevailing rule as expressed in Pfaeltzer v. Patterson, 49 Haw. 59, 60, 410 P.2d 874, 974 (1966), was that an order staying proceedings pending arbitration "being interlocutory, an appeal therefrom can be had only upon the allowance of the circuit judge." Id. Plaintiffs' reliance on Swinerton is misplaced since the opinion was not issued until 1985.

5/ continued
application of the holding there to the facts here would result in the conclusion that the defendant's appeal to this court was untimely. But since the opinion in Salud was only issued on November 10, 1987, we choose not to declare that we lack jurisdiction to entertain the appeal.

Hence, Burt correctly sought permission for an interlocutory appeal when plaintiffs' motion was granted. Having been denied leave then, his appeal after the confirmation of arbitration award, if timely, covered an appeal from the earlier order.

III.

Turning to the issues raised by Burt, we first address his contention that plaintiffs' "conduct was [in]consistent with a reliance upon the arbitration provisions in the contracts" and plaintiffs therefore "waived their right to enforce the arbitration provisions."

A.

Summarizing the precepts applicable when waiver is an issue, we said in Swinerton that "'the proclaimed public policy . . . to encourage arbitration as a

means of settling differences' preclude a court from lightly inferring a waiver of a right to arbitration or a default in proceeding thereto." Swinerton, 68 Haw. at ____, 705 P.2d at 35 (quoting Gregg Kendall & Associates v. Kauhi, 53 Haw. 88, 93, 488 P.2d 136, 140 (1971)). "Waiver is generally defined as an 'intentional relinquishment of a known right,' a 'voluntary relinquishment of some rights,' and 'the relinquishment or refusal to use a right.' State Savings & Loan Association v. Kauaian Development Company, 50 Haw. 540, 557, 445 P.2d 109, 121 (1968); Robinson v. McWayne, 35 Haw. 689, 719 (1940)." Anderson v. Anderson, 59 Haw. 575, 586-87, 585 P.2d 938, 945 (1978) (quoted in Swinerton, 68 Haw. at ____, 705 P.2d at 36. Though we concluded there was no waiver of a right to

arbitration in Swinerton, we indicated there would have been one "if the [plaintiffs'] conduct [could have been] deemed inconsistent with a reliance on the contract." Id. at ____, 705 P.2d at 36. But as we stated earlier, Swinerton was not controlling when the plaintiffs moved for a stay pending arbitration. And as we did earlier in deciding the defendant's appeal was a timely one, we choose to exercise lenity in applying a rule enunciated in an opinion after the circuit court acted.

B.

Having decided in favor of arbitrability, we turn to Burt's contention that the award should be vacated because the arbitrators were guilty of misconduct.

"[J]udicial review in arbitration

cases is strictly limited, since 'extensive judicial review of arbitration awards would frustrate the intent of the parties to avoid litigation and would also nullify the legislative objective in the enactment of the Arbitration and Awards statute [HRS Ch. 658]." University of Hawaii Professional Assembly ex rel. Daeufer v. University of Hawaii, 66 Haw. 214, 224, 659 P.2d 720, 727 (1983) (quoting Mars Constructors, Inc. v. Tropical Enterprises, Ltd., 51 Haw. 332, 335, 460 P.2d 317, 319 (1969)). Accordingly, "only when one of the grounds specified in [Hawaii Revised Statutes (HRS)] Sections 658-9 [6/] and 658-10 [7/] is

6/ HRS Section 658-9 (1985) reads in relevant part:
Vacating award: In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:

6/ continued

(1) Where the award was procured by corruption, fraud, or undue means;

(2) Where there was evident partiality or corruption in the arbitrators, or any of them;

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced;

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.

7/ HRS Section 658-10, in pertinent part, reads:

Modifying or correcting award. In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evidence miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award;

(2) Where the arbitrators have

met can an arbitrator's award be vacated or modified." Id. at 224-25, 659 P.2d at 727-28 (citing Mars, 51 Haw. at 336, 460 P.2d at 319-20) (footnotes omitted)). "Thus, the fact that an arbitrator may err in applying the law, finding facts, or in construing the contract, or enters an award that is contrary to the evidence adduced, is insufficient grounds for judicial reversal." Id. at 225, 659 P.2d at 728 (citing Kim v. Mel Cummins Building

7/ continued

> awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;
> (3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.
> The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties.

Contractor, Inc., 57 Haw. 186, 187-88, 552 P.2d 1117, 1118 (1976)). Indeed, "'[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.'" Id. at 225-26, 659 P.2d at 728 (footnote omitted) (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)); see also United Paperworkers International Union v. Misco, Inc., ____ U.S. ____, ____, 108 S.Ct. 364, 370 (1987).

Based on your review of the record, we cannot conclude there were sufficient

grounds to vacate or modify the arbitration award. [8]

Affirmed.

DATED: Honolulu, Hawaii, March 8, 1988.

/s/

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[8] We also find the defendant's argument that he should have been allowed to amend his pleadings is totally lacking in merit.

NO. 12259

IN THE SUPREME COURT OF THE
STATE OF HAWAII
Filed March 18, 1988

MAUI ARCHITECTURAL, GROUP, INC., A Hawaii Corporation KONRAD GROND, dba KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii Plaintiffs, vs. WILLIAM R. BURT, Defendant.	CIVIL NO. 5300(2) APPEAL FROM: (1) ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION FILED OCTOBER 14, 1982; (2) ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; (3) ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE MODIFY OR CORRECT ARBITRATION AWARD, FILED JUNE 1, 1987; (4) ORDER DENYING DEFENDANT'S MOTION

) FOR DISQUALIFICA-
) TION AND DENYING
) DEFENDANT'S MOTION
) TO AMEND PLEADINGS
) TO INCLUDE ADDI-
) TIONAL COUNTERCLAIM
) UNDER RULES 59(a)
) AND 59(e) OF THE
) HAWAII RULES OF
) CIVIL PROCEDURE AND
) STAY UNDER SECTION
) 641-(c) OF THE
) HAWAII REVISED
) STATUTES, FILED
) JUNE 24, 1987
)
) SECOND CIRCUIT
) COURT
)
) HONORABLE ARTHUR T.
) UEOKA and RICHARD
) R. KOMO JUDGES
)

ORDER DENYING MOTION
FOR RECONSIDERATION

The Motion for Reconsideration filed on March 16, 1988, is denied without argument.

DATED: Honolulu, Hawaii, March 18, 1988.

12259

IN THE SUPREME COURT OF THE
STATE OF HAWAII
Filed May 31, 1988

MAUI ARCHITECTURAL, GROUP, INC., A Hawaii Corporation KONRAD GROND, dba KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii Plaintiffs, vs. WILLIAM R. BURT, Defendant.	CIVIL NO. 5330(2)

ORDER

Upon consideration of the "Motion for Reconsideration of Order of May 25, 1988, Pursuant to HRAP Rule 40," which was improperly filed by Defendant-Appellant Burt pro se when represented by counsel of record, and in addition, is a clearly

untimely attempt to reopen the merits of this case,

IT IS HEREBY ORDERED that the motion is denied on the ground that the merits of this appeal were conclusively determined on March 18, 1988 when this court issued its order denying Defendant-Appellant Burt's motion for reconsideration of this court's opinion. See HRAP Rule 40(e).

DATED: Honolulu, Hawaii, May 31, 1988.

FOR THE COURT:

/s/ Edward S. Nakamura
Associate Justice
(seal)

12259

IN THE SUPREME COURT OF THE
STATE OF HAWAII
Filed June 15, 1988

MAUI ARCHITECTURAL, GROUP, INC., A Hawaii Corporation KONRAD GROND, dba KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii Plaintiffs, vs. WILLIAM R. BURT, Defendant.	CIVIL NO. 5300(2)

ORDER

Upon consideration of Defendant-appellant Burt's Motion for Reconsideration of order allowing costs,

IT IS HEREBY ORDERED that the motion is hereby denied.

DATED: Honolulu, Hawaii, June 15, 1988.

FOR THE COURT:

/s/ Edward S. Nakamura
Associate Justice
(seal)

JAMES KRUEGER
Attorney at Law
A Law Corporation

Lodged May 18, 1988
Filed May 25, 1988

JAMES KRUEGER 492
KEVIN H.S. YUEN 3509
2065 Main Street
Post Office Box T
Wailuku, Maui, Hawaii 96793

Telephone: 244-7444(Maui)
536-7474(Honolulu)

Attorneys for Plaintiffs

81-01 KYSY:SOS:jb

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI ARCHITECTURAL GROUP, a Hawaii corporation, KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii corporation,	Civil No. 88-00257ACK No. 12259, Supreme Court of Hawaii, No. 5300(2), Second Circuit Court
Plaintiffs,	ORDER ON PLAINTIFFS' MOTION TO DISMISS PETITION FOR REMOVAL OF CIVIL NO. 5300(2) FROM THE SUPREME COURT OF HAWAII TO THE U.S. FEDERAL DISTRICT COURT FOR THE DISTRICT OF HAWAII
vs.	
WILLIAM R. BURT,	
Defendant.	

ORDER ON PLAINTIFFS' MOTION TO DISMISS PETITION FOR REMOVAL OF CIVIL NO. 5300(2) FROM THE SUPREME COURT OF HAWAII TO THE U.S. FEDERAL DISTRICT COURT FOR THE DISTRICT OF HAWAII

Plaintiffs' motion to dismiss petition for removal of Civil No. 5300(2) from the Supreme Court of Hawaii to the U.S. Federal District Court for the District of Hawaii came on for hearing before the Honorable Jack Tanner on May 9, 1988. The parties having appeared thereat, and the court having had the benefit of reviewing the record and files herein and listening to the presentation of counsel,

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREE that plaintiffs' motion to dismiss petition for removal of Civil No. 5300(2) from the Supreme Court of Hawaii to the U.S. Federal District Court for the

District of Hawaii is hereby granted in its entirety.

DATED AT Honolulu, Hawaii, May 23, 1988.

/s/ JACK E. TANNER
Judge of the above-entitled court

NO. 12259

IN THE SUPREME COURT OF THE
STATE OF HAWAII

Filed March 16, 1988

MOTION FOR RECONSIDERATION

Defendant-Appellant WILLIAM R. BURT, by and through his attorneys, Jaress & Raffetto, respectfully moves this Court to reconsider its opinion filed March 8, 1988. This Motion is made pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure and is based upon points of law and fact which this court misapprehended or overlooked, including but not limited to the following:

1. The jurisdictional implications of the failure of Appellee Maui Architectural Group, Inc. (MAG) to join Mrs. Jean Burt as an "Owner" in the Circuit Court action;

2. The misconduct of the arbitrators in carrying out the "submission order" requiring the third arbitrator to be an attorney;

3. The constitutional due process implications of the failure of one arbitrator to visit the site as agreed;

4. The fact that the arbitrators allowed Appellees to delay arbitration over four and a half years as constituting arbitrator misconduct;

5. The Court may have overlooked the difference between fraud in the factum and fraud in the inducement in analyzing Appellant's argument regarding his right to amend his pleadings in the Circuit Court action;

6. The requirements of the Fourteenth Amendment of the U.S. Constitution right to due process in

connection with each of the above points.

This Motion is also based upon the briefs filed and argument held herein, which are incorporated herein by reference.

DATED: Wailuku, Maui, Hawaii, March 16, 1988.

/s/ SHACKLEY F. RAFFETTO

NO. 12259

IN THE SUPREME COURT OF HAWAII

Filed May 31, 1988
MOTION FOR RECONSIDERATION
OF ORDER OF MAY 25, 1988,
PURSUANT TO HRAP RULE 40

1. For jurisdictional purposes, it is fortunate that the Federal District Court has remanded the cause to this Court by Order dated May 25, 1988.

2. The remand restores the jurisdiction that was the basis for the denial of the motion by this Court filed May 25, 1988 (same date as Order Denying Motion).

3. By coincidence, this permits Defendant to comply with the requirement stated by the Supreme Court of the United States in Pennzoil v. Texaco, 55 L.W. 4457 (4/6/87), that the proper procedure is to permit the State courts to review the

issues under State law prior to bringing an action in the Federal courts under United States statutes, such as 42 U.S.C. 1983, 1985 and 1988, or removal (complying with Texas v. Pullman, 312 U.S. 496 (1971).

4. The issues for review have been summarized in Defendant's "Motion for Withdrawal of Counsel - Request for Imposing Conditions" filed in this Court on May 25, 1988, which was part of the subject matter of this Court's Order, also filed on may 25, 1988. (Note of erratum: two paragraphs are numbered six, so the second one should be numbered seven with changes in the succeeding paragraphs so that the final paragraph is "twelve"). Along with the "Request" were filed referenced documents from the record on appeal in this Court (they also appear at

R-42-47, 64-67, and transcript #1565 of September 30, 1982, Hearing before the late Judge Ueoka).

5. One enclosure to the "Request" memorandum is Defendant's "Memorandum in Support of Defendant's Motion for Partial Summary Judgment" as filed in the Federal Court on April 21, 1988. In it are analyzed the issues now before this Court.

6. These issues come before this Court in the context of:

a. Was there mistake or misconduct by counsel for both parties that interfered with the just adjudication of material issues or induced judicial error?

b. What are the material issues affected by the conduct?

c. What is the place of such issues in the overall litigation and

final decisions?

d. What are the implications of such decision in relation to the Constitutions of the United States and of Hawaii? What constitutionally protected rights have been denied as the result of the decisions based on induced judicial error?

e. In addition to Hayashi v. Hayashi, 661 P.2d 171, 175 (Haw. 1983)on the issue of mutual or jurisdictional mistake, Defendant cites International Controls Corp. v. Vesco, 556 F.2d 665, 670 (1977).

7. One episode, in particular, Defendant seeks to have reviewed by this Court at this time under the "due process" and "equal protection" provisions of Article V, Section 1 of the Hawaii Constitution and Fourteenth Amendment to

the United States Constitution is the "mutual mistake" or "judicial mistake" that took place in connection with the Second Circuit Court applying and interpreting the "Disputes" provision in Defendant's contract with the building contractor, Grond. Eighty percent (80%) of the arbitrator's award was to Grond.

a. Discussion appears under paragraph 6(b)(i-iii) on page 2 of the "Request" memorandum filed May 25, 1988.

b. Further discussion and analysis appears in paragraphs 5(a)-(d) in documents, pages 8-11 of "Memorandum in Support" attached to the "Request" memorandum.

8. To facilitate reference, R-44 containing text of the "Disputes" provision and pages 9-11 of the

"Memorandum in Support" are attached hereto as Exhibits 1 and 2.

9. Defendant's appeal in the Federal courts will concentrate on the issues spelled out in Defendant's proposed "Amended Petition for Removal" filed in Federal District Court on May 25, 1988 and appended hereto as Exhibit 3.

a. Defendant's concept of the Constitutional (Federal) and Civil Rights issues that have arisen from the present litigation are spelled out in paragraphs 5-21 of Exhibit 3, thus providing this Court with an opportunity to rule on each issue under applicable provisions of the Hawaii Constitution (Article V, Section 1, re "due process" and "equal protection"), Hawaii statues and decisional law. This Court has

already ruled the Constitutional standards of Hawaii may be higher than Federal standards under the Fourteenth Amendment. State v. Tanaka, 67 Haw. 658 (1985).

10. Based on such rulings, there will be a clear statement of applicable Hawaiian law for consideration by the Federal courts in the event of appeal under such statutes as 28 U.S.C. 1257(2), 1291 and U.S.C. 1447(d) and Rule 4 of the Federal Rules of Appellate Procedure (i.e., appeal from orders issued by Federal District Court in Civil No. 88-00257 ACK).

11. (a) In its "Memorandum Opinion" filed herein on March 8, 1988, the Court noted (p. 3): "The contracts between Burt and Grond also provided that disputes arising thereunder were "subject to

arbitration" which confirms the Court was not presented with facts applicable to the "Disputes" provision." (quoted R-44 in print large enough to read. Only in very small print in the printed contracts themselves [R-5, R-31]).

(b) As pointed out in the "Memorandum in Support", arbitration was to occur only in the event there was disagreement with the licensed architect's decision.

(c) (i) There was a licensed architect supervising the job and hence, the provision was not applicable. "If there shall be no architect or material house, then all decisions shall be submitted to arbitration."

(ii) The phrase this Court quoted "subject to arbitration" is based on there being dissatisfaction with the architect's decision and "notice thereof

is given by either party in writing within ten (10) days of the date of the decision" by the architect.

(iii) There had been no prior decision by the architect and, hence, no written request for arbitration.

(iv) Hence, Defendant was under no contract obligation to arbitrate with Grond within the scope of H.R.S., Section 658-1.

(d) Both counsel for the Plaintiffs and counsel for the Defendant contributed to causing this judicial mistake, so neither party can be heard to oppose this Court's correcting the results of the mistake by vacating the Submission Order (R-64-65) and the Order Confirming the Arbitrator's Award and Judgment thereon. (R-355-356).

12. In regard to paragraph 10 (p.5)

of Exhibit 3, at the time Defendant was before the Second Circuit Court, Pfaeltzer v. Patterson, 49 Haw. 59, 60, 410 P.2d 974 (1966) was controlling law in Hawaii and Defendant could not appeal as of right from the trial court's misapplication of H.R.S., Section 658-1. He did preserve his right to appeal the denial of his right to interlocutory appeal. Now that Ass'n of Owners of Kukui Plaza v. Swinerton & Walberg, 68 Haw. ____, ____, 705 P.2d 28, 35 (1985), has been decided, Hawaii has corrected the former constitutional infirmity of the arbitration statutes. If the trial court errs in applying H.R.S. 658-1, a defendant can appeal. But this does not save the lack of constitutional protection provided by the State to Defendant in the present proceedings. When this Court confined

itself to the scope of H.R.S. 658-9 for review in the present proceedings, it nullified the benefits of Swinerton as applicable to these proceedings.

WHEREFORE, Defendant-Appellant invokes the plenary powers of this Court to grant such full relief in this cause as this Court deems appropriate, including vacating or setting aside of orders herein such as "Order Granting Plaintiffs' Motion to Stay" filed October 14, 1981, "Order Granting Plaintiffs' Motion to Reinstate for Good Cause", filed August 22, 1985, and "Order Confirming AAA Award and Judgment" filed May 13, 1987.

DATED: Pukalani, Hawaii, May 31, 1988.

WILLIAM R. BURT
Defendant-Appellant
Pro Se

Paragraph 18 of the agreement between Konrad Grond and the defendant states:

> 18. DISPUTES: All disputes arising hereunder shall be submitted to the licensed architect, if any superintending said construction, and if none, then to the material company which may be surety on the bond; provided, however, that the architect's decision or the decision of the material company, as the case may be, shall be subject to arbitration if notice thereof is given by either party in writing within ten (10) days of the date of the decision. If there shall be no architect or material house, then all decisions shall be submitted to arbitration. In the event of arbitration, one arbitrator selected by the parties hereto shall determine the dispute, and failing agreement as to the selection of am arbitrator, three disinterested arbitrators (who shall be licensed general contractors, architects, or structural engineers) shall determine the dispute, one to be appointed by each party hereto. If either party fails to name his arbitrator within ten (10) days after notice in writing of the appointment of the first arbitrator, the first arbitrator may name the second arbitrator. The two thus chosen, in either manner, shall name the third arbitrator. If they

Exhibit 1

cannot agree within ten (10) days, either may request any judge of the Circuit Court of Hawaii within which the premises are situated to name the third arbitrator. The majority decision of the arbitrators shall be final and binding upon the parties hereto. Each party shall pay one-half of the costs of the arbitrators' fee and each party shall pay all other costs incurred by such party.

On the basis of the foregoing, plaintiffs respectfully request that this proceeding be held in abeyance pending resolution of the requested arbitration.

Dated at Wailuku, Maui, Hawaii, this 7th day of July, 1982.

/s/JAMES KRUEGER

Petition). The order (Ex. C) is void. Crosby v. Bradstreet Co., 312 F.2d 483, 485 (1963). The opinion notes that because the order was void, relief must be granted, and in that proceeding under Rule 60(b)(4).

c) The "Disputes" provision of the contract with Grond (Ex. A, p. 3) sets forth a two tier procedure:

> (i) "All disputes arising hereunder shall be submitted to the licensed architect (Hestand for MAG)
> (ii) The architect's decision shall be subject to arbitration if notice thereof is given by either party in writing within ten (10) days of the date of the decision
> (iii) The two steps above have to take place to cause arbitration before either a single arbitrator or a three arbitrator panel because only the "architect's decision * shall be subject to arbitration" when there is a licensed architect (Hestand for MAG) on the job "superintending said construction."
>
> Exhibit 2

d) (i) Hestand, the licensed architect, had joined Grond in filing a joint complaint on May 4, 1981, using the services of a single attorney, Mr. Krueger. They filed a statement of readiness on April 17, 1982.

The use of the same attorney raises questions as to collusion, Sapienza v. New York News, 481 F.Supp. 676, 680 (1979). Particularly in view of the fiduciary relationship between the architect and his employers. 6 C.J.S. Architects, Sec. 26, p. 490. Rowe v. Moss, 556 SW2d 318, 321 (Mo., 1983).

(ii) In any event Hestand's joining the complaint disqualified him on the basis of bias from serving subsequent to the filing of the complaint as the decision maker in the first tier under the "Disputes" provision. Commonwealth Corp.

v. Casualty Corp, 393 U.S. 145, 150 (1968); also see Goldberg v. Kelly, 397 U. 254, 271 (1970), and 6 C.J.S. "Arbitration" Section 153(b), p. 404, "Bias on Partiality".

(iii) Without prior decision by Hestand, there was nothing "subject to arbitration" under the "Disputes" provision of the contract with Grond.

(iv) Grond is bound by Hestand's disqualifying act, because Grond consented to the two joining in the complaint. Hence, Grond was not entitled to invoke the "Disputes" provision under his contract with Defendant.

(v) In the light of the analyses above the request dated July 7, 1982 (Ex. 2 to Ex. A) from Mr. Krueger to Mr. Raffetto that the latter "contact me as to a schedule whereby the licensed

architect may hear the claims of our respective clients and decide the same" confirms that Mr. Hestand (for MAG) was the "licensed architect" referred to under the "Disputes" provison [sic] of the contract with MAG. Mr. Raffetto made no reply to the letter's request for any scheduling of hearings before Hestand. Ex. A and its Ex. 2 have the same date.

(vi) The discussions and deliberations reflected in Ex. B (Transcript) point out that neither the attorney for the Plaintiff, nor for the Defendant, nor the Court was aware of the limited scope of aribtration [sic] incorporated in the "Disputes" provision of the contract between Defendant and Grond and, hence, the decision and order are the product of mutual mistake or judicial mistake. Mutual 58 C.J.S.

"Mistake", p. 832 "Mutual Mistake". Keystone Fuel Oil v. Del-Way Petroleum, 364 A2d 826, 829 (Del 1976), Bernstein v. Kapneck, 417 A2d 456, 460 (Md 1980).

6. (a) The next point to focus on is the transcript of proceedings (No. 1565, Ex. B hereto) before Judge Ueoka on September 30, 1982 which points to the need reflected in the "Order Granting Plaintiff's Motion to Stay Proceedings Pending Arbitration" filed October 14, 1982 (Item 10 in the Record on Appeal and Ex. C. hereto) stating: "It Is Further Ordered That, the third arbitrator selected by the parties shall be an attorney." (Underscoring added).

(b) Instead the two arbitrators selected by each party selected as the third arbitrator an architect. A material variance in view of the fact that one of

the plaintiffs was an architect, and the other a builder.

(c) The basis for Judge Ueoka's solution that the third arbitrator be an attorney is found in the problem stated (p.3, L. 20-22 of Ex. B): "So you don't have a legally-trained person hearing what really are fairly technical legal problems." This refers particularly to eight counterclaims.

(d) (i) Mr. Kruger [sic] proposed that "we" get this matter resolved * * * by appointing the arbitrators and having them appoint a third one." (Ex. B., L. 20-21).

(ii) The third arbitrator would be the chairperson

AMENDED PETITION FOR
REMOVAL OF CIVIL NO. 5300(2)
FROM THE SUPREME COURT
OF THE STATE OF HAWAII TO THE
U.S. FEDERAL DISTRICT COURT
FOR THE DISTRICT OF HAWAII

To the Honorable Judges of the United States District Court for the District of Hawaii:

Petitioner, WILLIAM R. BURT, appearing pro se, respectfully shows this Court:

1. Petitioner is the Defendant-Appellant in the above-entitled action and is a citizen and resident of the State of Hawaii.

2. On March 8, 1988, there was filed with the Clerk of the Supreme Court of Hawaii a Memorandum Opinion in the above-entitled action which was served by mail and received by Petitioner on March

Exhibit 3

9, 1988. This "order or other paper" was the first opportunity for Defendant to determine that the proceedings were removable. 28 U.S.C. 1446(b).

3. A Motion for Reconsideration was filed in the Supreme Court of Hawaii by Defendant-Appellant on March 16, 1988, and denied by Order dated March 18, 1988, of which a copy was received through the mail on March 22, 1988. Complying with the requirements of Pennzoil v. Texaco, 55 L.W. 4457, 4460 (4/6/87) that the State court be provided with an opportunity to review the issue under State law.

4. Plaintiffs-Appellees are citizens and residents of the State of Hawaii.

5. The Complaint in the above-entitled action sets forth claims by an

architect joined with a builder for additional monies claimed under two different contracts. The defense is based on breach of contract, collusion and fraud in the performance of the contract.

The contract between Maui Architectural Group, Inc. (MAG) was entered into December 19, 1978, and is "Between the Owner: Mr. and Mrs. Bill Burt (Jean)" as one contracting party and MAG as the architect.

The Complaint was filed May 4, 1981, and fail to name Mrs. Burt as a Defendant, and the State action proceeded to Submission Order, arbitration, and Order Confirming the Award, despite objections raised by Mr. Burt that Mrs. Burt was an indispensable party. From the date of the Complaint, May 4, 1981 to the present, Mrs. Burt has been a

resident of Hawaii and available for service.

The status of State law as indispensable parties is spelled out in Defendant-Appellant's Memorandum in Support of his Motion for Reconsideration in pages 1-5 (attached hereto as Exhibit "B"). Because the Hawaii Supreme Court confined its review to the grounds enumerated in Hawaii's arbitration statute, H.R.S., Section 658-9, "Vacating Awards" (copy attached as Exhibit "A"), it never reached the merits of the issues raised under the Fourteenth Amendment in the Memorandum.

Defendant-Appellant could not waive Mrs. Burt's rights, McShan v. Sherrill, 283 F.2d 462, 464 (CA-9, 1960), and the rights of which she has been deprived which are protected by the

Fourteenth Amendment of the United States Constitution include:

(1) Notice
(2) Hearing
(3) Confrontation and Cross-Examination
(4) Discovery

Goldberg v. Kelly, 397 U.S. 254, 267-271 (1970).

Further, under the Doctrine of Merger, the contract with MAG is merged in the State judgment confirming the award, H.R.S., Section 658-12, Rock Island Bank and Trust Co. v. Stauduhar, 375 N.E.2d 1383, 1389 (Ill. 1978). Mrs. Burt's rights may be extinguished if the contract with MAG is held to be merged out of existence into the judgment.

The Supreme Court of the United States has held that what has happened to Mrs. Burt is a denial of elementary and fundamental requirements of due process. Mullane v. Central Hanover Tr. Co., 339

U.S. 306, 314 (1950).

6. The Hawaii Supreme Court stated in its Memorandum Opinion on page 8 (attached hereto as Exhibit "C")::

> . . . only when one of the grounds specified in Hawaii Revised Statutes Sections 658-9 and 658-10 [attached hereto as Exhibit D] is met can an arbitrator's award be vacated or modified . . . to do otherwise would "nullify the legislative objective in the enactment of the arbitration and awards statute".

The Court quotes from its 1969 Mars opinion so it is stating settled law in Hawaii.

7. Consequently, the Courts in Hawaii have, as a matter of Hawaii law, confined their review authority to the specific provisions of Section 658-9, which, by its terms, does not deal with errors that may have been made in applying other parts of the same statute such as the ordering of arbitration under Section

658-1.

The result is that Defendant is denied and cannot enforce specified Federal rights in the State courts. Details of such rights have been spelled out and applicable law analyzed in Defendant's "Memorandum in Support of Defendant's Motion for Partial Summary Judgment" filed herein on April 21, 1988, attached hereto as Exhibit "E" (per FRCP 10(c)).

8. In the case of the contract with MAG, an indispensable party was not named in the Complaint and, hence, not included in the arbitration order.

9. In the case of the contract with the builder (Grond), the architect had not been requested to render his decision on any dispute and, only in the event of disagreement by a party with the

architect's decision, could there be a request to submit the decision to arbitration. (Detailed analysis of "Disputes" provision and applicable law set forth at pages 9-11 of Exhibit "E", "Memorandum in Support" filed herein on April 21, 1988). Defendant's obligation to arbitrate under the contract would arise only in accordance with the terms of the contract. The existence of such a contract commitment is fundamental to the concept of arbitration. Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582 (1960).

10. Hawaii's arbitration statute is flawed, based on the United States Constitution, in that there is not included under H.R.S., Section 658-9 any provision for vacating an award in the event the rights of a party protected by

the Fourteenth Amendment (due process and equal protection) are violated when the Hawaii courts exercise authority under H.R.S., Section 658-1 to initiate the arbitration procedures.

11. Absent some catch-all provision in H.R.S., Section 658-9, it is inevitable that parties who should not be ordered to arbitration may be so ordered and have no redress from a resulting arbitration award because their situation is not provided for under H.R.S. Section 658-9. As a result, it is firmly predictable that Defendant would be and has been denied and cannot enforce his Federal rights (Exhibit "E") in the State courts.

12. The rights described in paragraphs 8 and 9, supra, may be protected in an action under 42 U.S.C.

1983 which, along with the unconstitutional shortcomings of the Hawaii arbitration statutes (Exhibit "A", H.R.S., Section 658-1, et seq.) as interpreted and applied by the Hawaii Courts (paragraph 6, supra), meets the two-pronged test for removal under 28 U.S.C. 1443, set forth in Johnson v. Mississippi, 421 U.S. 213, 219 (1975).

13. As described on page 4 of the Memorandum in Support hereof, Defendant will have an additional cause of action under 42 U.S.C. 1985(2) relating to misrepresentations to the Hawaii courts as to the cause of the over four year delay between Submission Order and the commencement of the arbitration hearings.

14. The limited scope of review by the Hawaii Courts (paragraph 6, supra)

ignores the applicability of Article VI, Clause 2 of the United States Constitution (Supremacy Clause) and the command of the Fourteenth Amendment requiring observance of due process, and the according of equal protection of the laws, by the States, and that the judges in every state are bound by the United States Constitution to recognize its command as the supreme law of the land "anything in the Constitution or Laws of any state to the contrary notwithstanding". (Emphasis added).

The Pullman procedure (Texas v. Pullman, 312 U.S. 496 (1971) could be invoked on this issue and might result in the Federal courts not having to find the Hawaii arbitration statute unconstitutional by flawed on the grounds specified in paragraphs 10 and 11, supra.

The final say on whether a State statute is repugnant to the United States Constitution is for the Federal courts. 28 U.S.C. 1257(2).

15. The introduction of arbitrators does not sever the Fourteenth Amendment responsibility of judges who must enter an order confirming the award (H.R.S. Section 658-8) and a judgment thereon (H.R.S. Section 658-12) and assure the Court that the arbitrators have complied with the court's submission order, Theofano Maritime Co. v. 9551.9 Long Tons, 122 F.Supp. 853, 858 (D.C. Md. 1954), and that the arbitration proceedings meet the requirements of due process and equal protection relating to an "impartial tribunal", Goldberg v. Kelly, 397 U.S. 254, 271 (1970). The requirement of a tribunal free from bias

rests on the due process clause of the Fourteenth Amendment, not solely on H.R.S. Section 658-9 (Exhibit "D" attached hereto), USCA Constitution, Amendment 14, Sec. 1, Note 890, p. 240, U.S. v. Sciuto, 531 F.2d 842, 845 (1976). This is true whether the Fifth or the Fourteenth Amendments are involved. Goldberg, supra.

16. The hearing in the Second Circuit Court of Hawaii on confirming the award was the first opportunity available to Defendant-Appellant to challenge the arbitrator's actions in court.

17. Partiality on the part of one of the three arbitrators is sufficient to warrant the setting aside of the award although it was unanimous and although the award by the others would have been valid. 6 C.J.S. "Arbitration", Sec. 153(b), p. 405-406, citing Wheeler v. St.

Joseph Hospital, 133 Cal.Rptr. 775, 792-793 (1977).

18. If the Hawaii arbitration statutes oust the Hawaii courts from oversight as to whether their Submission Order has been complied with, then the statues are unconstitutional on their face or as applied. 16A Am.Jur.2d "Constitutional Law", Sec. 822, citing Brinkerhoff-Farris Co. v. Hill, 281 U.S. 673, 680-682 (1930). (Order Denying Motion for Reconsideration filed March 18, 1988, Exhibit "D" attached hereto).

19. Further, if according to interpretation by the Hawaii Supreme Court in its Memorandum Opinion (Exhibits "C" and "D"), the statutes permit a delay between the filing of the complaint (in this instance, May 4, 1981) to the beginning of arbitration on January 5, 1987 (the delay was caused by Plaintiffs-

Appellees, Exhibit "B", page 11}, and the statutes make no provision for discovery (H.R.S. Section 658-7 provides only for the summoning of witnesses and the production of documents at the arbitration hearing), then they are either invalid on their face or as applied. Goldberg, supra, at pp. 270-271, and cases cited in Exhibit "B", p. 12.

20. Further, if the statutes do not provide a standard for an "impartial tribunal" equal to or superior to the Federal standard, they are either in violation of the United States Constitution on their face or as applied. (See Exhibit "B", pp. 10-11). Goldberg, supra, at p. 271 and Commonwealth Corp. v. Casualty, 393 U.S. 145, 150 (1968), states the standard under the United States

Constitution, 14th Amendment.

21. The inaction or abstention of the Hawaii State courts (Exhibit "E") make it necessary that this Federal District Court assume jurisdiction of the cause so that there may be an adjudication that will give consideration to and protect Defendant-Appellant's rights to due process under the Fourteenth Amendment of the United States Constitution. Brinkerhoff-Farris Co. v. Hill, 281 U.S. 673, 680-682 (1930).

Because of the wording of H.R.S. 658-9 or the way it is applied by the Hawaii courts, it is clear that Defendant (and others so situated) would be and has been denied and cannot enforce his Federal rights (Exhibit "E") in the State courts.

We are advised that Mrs. Burt intends to file a petition to intervene in

the action before the Federal District Court when the Court assumes jurisdiction of the cause so that there will be actual rather than vicarious requests for protection of her rights in the cause.

22. This Court has original jurisdiction of the above-entitled action pursuant to 28 U.S.C. Sections 1331 and 1343, and the action may therefore be removed to this Court pursuant to 28 U.S.C. Sections 1441(b) and 1443(1).

23. Pursuant to 28 U.S.C. Section 1446(d), Petitioner has filed a bond (pursuant to Paragraph 4(a), supra) with good and sufficient surety conditioned that Petitioner will pay all costs and disbursements incurred by reason of the removal proceedings herein sought should it be determined that the above-entitled action is not removable

or that it was improperly removed.

24. Copies of the following documents referred to herein are attached hereto as Exhibits "A" through "E":

Exhibit A:	Hawaii Arbitration Statute, H.R.S. Section 658-1, et seq.
Exhibit B:	Defendant-Appellant's Motion for Reconsideration; Memorandum in Support of Motion, filed with the Supreme Court of the State of Hawaii on March 1, 1988
Exhibit C:	Memorandum Opinion of the Supreme Court of the State of Hawaii filed on March 8, 1988
Exhibit D:	Order Denying Motion for Reconsideration filed March 18, 1988
Exhibit E:	Memorandum in Support of Motion for Partial Summary Judgment

25. Copies of documents served on Petitioner and/or filed in the above-

entitled action are attached to the original Petition filed March 25, 1988, as Exhibits 1 through 12 (face sheet index attached thereto).

26. The original Petition was filed with this Court within 30 days after service on Petitioner of the Memorandum Opinion of the Supreme Court of Hawaii, filed March 8, 1988, in the above-entitled action. Copies of the original Petition were filed with the Second Circuit Court of Hawaii (March 29, 1988) and the Supreme Court of Hawaii on March 28, 1988.

WHEREFORE, Petitioner prays that the above-entitled action be removed from the Supreme Court of the State of Hawaii to this Court.

DATED: Pukalani, Hawaii,

_____.

/s/WILLIAM R. BURT
Defendant Pro Se

12259

IN THE SUPREME COURT OF THE
STATE OF HAWAII

MAUI ARCHITECTURAL, GROUP, INC., A Hawaii Corporation KONRAD GROND, dba KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii Plaintiffs, vs. WILLIAM R. BURT, Defendant.	CIVIL NO. 5300(2) DOCUMENTS SUBMITTED 1. MOTION FOR RECONSIDERATION OF ORDER WITH TWO ENCLOSURES 2. CERTIFICATE OF SERVICE

WILLIAM R. BURT
480 Hoopalua Drive
Pukalani, Maui, Hawaii 96768

Telephone: 572-1162

Defendant Pro Se

NO. 12259

IN THE SUPREME COURT OF THE
STATE OF HAWAII

MAUI ARCHITECTURAL, GROUP, INC., A Hawaii Corporation KONRAD GROND, dba KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii Plaintiffs, vs. WILLIAM R. BURT, Defendant.	CIVIL NO. 5300(2) MOTION FOR RECONSIDERATION OF ORDER OF JUNE 8, 1988

MOTION FOR RECONSIDERATION OF ORDER

1. Defendant-Appellant WILLIAM R. BURT appearing pro se respectfully moves this Court to reconsider its order filed June 8, 1988.

This motion is made pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure and is based on the fact that

jurisdiction of the case has never been remanded to this Court and pursuant to the "Notice" filed herein by Defendant on June 2, 1988, jurisdiction over the case since May 31, 1988 has rested in the Federal Court of Appeals for the Ninth Circuit.

2. a) On June 7, 1988, the Clerk's office of this Court returned unfiled a document filed in #12259 entitled, "1) Motion on Jurisdiction, 2) Order of March 30, 1988 Continue as Only Valid Order" and

b) A notice from Clerk (copy enclosed).

3. The above document was intended to provide this Court, in the interest of comity, with copies of what is now before the U.S. District Court acting under FRAP #8 for the Ninth Circuit Court of Appeals. It is a motion for a permanent

injunction against the Courts of the State of Hawaii proceeding further in the case except with permission of the Ninth Circuit Court as provided in Texas v. Pullman, 312 U.S. 496, 500-512 (1971) discussed in "Law of Federal Courts" (C.A. Wright, West 1983/pps 303-306. Jurisdiction will remain in the Federal Courts.

4. Based on the foregoing, Defendant requests permission to refile the "Motion on Jurisdiction" document in this Court so that it may be considered in connection with the Petition for a Writ of Prohibition (#13103) now before this Court and with this motion.

5. Fortunately the Second Circuit Court has in its order of June 8, 1988, in the interest of comity, stated that further action in that Court will await

the outcome of the Federal injunction proceedings, now scheduled to be heard on July 11, 1988. The Second Circuit Court acted on the basis of the contents of its copy of the "Motion on Jurisdiction", etc. papers that Defendant sought to file in the Supreme Court of Hawaii on June 7, 1988.

6. a) The Court's attention is invited to the enclosed copy of the Clerk's docket in USDC-Hawaii. No order of remand is listed or mentioned as is required by 28 U.S.C. 1447(c). Plaintiffs sought and prepared an order of dismissal, and that is what USDC-Hawaii approved.

b) The difference is discussed in Vol 1A, Moore's "Federal Practice and Procedure" "Removal" para 0,169,p. 675 "Remand or Dismissal."

c) Consequently the orders of

the courts of Hawaii entered after the order of the Supreme Court of Hawaii on March 30, 1988 re coram non judice, National Steamship Co. v. Tugman, 106 U.S. 116, 122 (1882), cited with approval in E.D. Systems Corp v. Southwestern Bell Tel.,674 f.2D 453, 457 (1982).

7. If the Supreme Court of Hawaii received no jurisdiction via an order of remand from the United States District Court, then the Supreme Court had no jurisdiction over the case to, in turn, remand to Hawaii's Second Circuit Court.

Respectfully submitted,

_____

William R. Burt
Attorney Pro Se

Office of the Clerk
Supreme Court of Hawaii
P.O. Box 2560
Honolulu, Hawaii 96804-2560
Phone: 548-7430

Supreme Court Case No.: 12259
Received: 6/7/88
Case: Maui Architectural v. Burt
Rejected: 6/7/88
Document: Motion on Jurisdiction, Etc.

**DOCUMENT REJECTED FOR THE FOLLOWING REASON(S):

[ ] Requires affidavit of attorney(s).

[ ] Requires a copy of the extension request and/or affidavit of the court reporter(s).

[ ] Requires a signed Certificate of Service
  [ ] Service method (hand delivery, mail)
  [ ] Date of service

[ ] Insufficient number of copies. The court requires an original and at least ____ copies. If you require additional file-stamped copies for any reason, then submit more copies that the required amount.

[ ] Incorrect denomination of parties (caption).

[ ] A first extension to docket the record on appeal must state whether an extension was or was not received

from the lower court, and if received, for what period.

[ ] OTHER: JUDGMENT & NOTICE OF JUDGMENT ON APPEAL FILED IN SUPREME COURT NO. 12259

** RETURN THIS NOTICE WITH CORRECTED DOCUMENT

EUGENE L. SABADO
Clerk of Supreme Court

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILED DATE MO	DAY	YEAR	J	N/S	O	CJ PTF	CJ DEF	R 23	$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
0975	1	88	00257	03	25	88	3	890	2				Nearest $1,000	J 7509 M	15009		88	00257 A(

PLAINTIFFS

MAUI ARCHITECTURAL GROUP, INC.,
a Hawaii corporation;
KONRAD GROND CONTRACTING,
aka GROND CONTRACTING, INC.,
a Hawaii corporation

DEFENDANTS

BURT, WILLIAM R.

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

ATTORNEYS

JAMES KRUEGER
KEVIN H.S. YUEN
2065 Main St.
P.O. Box T
Wailuku, Maui 96793
Phone: 244-7444 (Maui)
536-7474 (Honolulu)

William Burt
•c/o 2170 B Main ST. #12
•P.O. Box 1147
•Wailuku, Maui 96793
480 Hoopalua Drive
Pukalani, Maui, HI 96768
Phone: 572-1162

5-31-88 103899 William Burt NA: $5.00; DF: $100.00

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID			STATISTICAL CARDS	
DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
3-29-88	101527 William R. Burt	120.00	JS-5	
4-12-88 DV 11706 ac 331 (60.00) ac 405 (60.00) ac 209 (250.00) ac 103 (2.00)				
4-20-88 102304	William R. Burt ac 331 60.00; ac 405 60.00; ac 209 250.00; ac 103 2.00			

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 9/81)

DATE	NR.	PROCEEDINGS
1988		
Mar 25	1	Petition for Removal of Civil No. 5300(2) From the Supreme Court of the State of Hawaii to the U.S. Federal District Court for the District of Hawaii; Accompanying Documents
	2	Order Setting Rule 16 Scheduling Conference - 7-15-88 @ 8:30, Conklin FONG
29	3	Certificate of Service - On Behalf of Defendant
31	4	Notice of Motion; Motion to Dismiss Defendant's Petition for Removal of Civil No. 5300(2) From the Supreme Court of the State of Hawaii to the U.S. Federal District Court for the District of Hawaii; Memorandum in Support of Motion; Certificate of Service - set for 5/9/88 @ 9:00 a.m. Judge Tanner - On Behalf of Plaintiffs
Apr 19	5	Certificate of Service - On Behalf of Defendant
21	6	Notice of Motion; Memorandum in Opposition to Plaintiffs' Motion Dated March 29, 1988 to Dismiss Because of Noncompliance with 28 U.S.C. 1446 (b); combined with Defendant's Motion for Sanctions Pursuant to FRCP #11; Defendant's Motion for Partial Summary Judgment or Relief Under RCP No. 60(b); and Memorandum In Support Thereof, with Affidavit; Text of Order for Partial Summary Judgment; Certificate of Service - set for 5-9-88 @ 9:00 a.m., Judge Tanner - on behalf Defendant
27	7	Writ of Certiorari to State Court for Record in Removal Action KAY
May 4	8	Memorandum in Opposition to Defendant's Motion for Sanctions Pursuant to F.R.C.P. Rule 11 and for Partial Summary Judgment or Relief Under F.R.C.P. 56(b) and (d); Exhibits "A" - "C"; Certificate of Service - On Behalf of Plaintiffs
	9	Supplemental Memorandum in Support of Motion to Dismiss Defendant's Petition for Removal of Civil No. 5300(2) From the Supreme Court of the State of Hawaii to the United States District Court for the District of Hawaii; Exhibits "A" - "C"; Affidavit of Kevin H.S. Yeun; Certificate of Service - On Behalf of Plaintiffs
	10	Notice of Motion; Motion to Strike Under FRCP 12(d) and Local Rule 22-11 and Memo in Support Thereof; Certificate of Service - set for 5/9/88 @ 9:00 a.m. Tanner - On Behalf of Defendant
5	11	Supplemental Affidavit of Opposition to Defendant's Motion for Partial Summary Judgment or Relief under F.R.C.P. No. 60(b); Exhibit "A"; Certificate of Service - On Behalf of Plaintiffs
	12	(1) Defendant Withdraws Motion for Sanctions; (2) Reply to Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment - On Behalf of Defendant
	13	(1) Text of Proposed Order to Strike (Attached) Under FRCP 12(f); (2) Correction to "Motion to Strike" Papers Filed by Defendant on May 4, 1988 - On Behalf of Defendant
6		Received from Supreme Court, State of Hawaii - see expanding folder (Return to Supreme Court when case is closed)
	14	Corrections on Pages 4 and 16 to "Notice of Motion" and other papers filed on April 21, 1988 - On Behalf of Defendant William Burt
9	15	Memorandum for May 9, 1988 Hearing in United States District Court for the District of Hawaii on behalf of deft EP: Various Motions - 1. Pltf's M/D Deft's Petition for Removal taken under advisement; 2. Deft's M/Partial Summary Judgment and Deft's M/Strike Under FRCP 12(d) and LR 220-11 deferred pending ruling on pltf's M/Dismiss (YI) JACK E. TANNER

see pg 2

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 88-257 ACK
MAUI ARCHITECTURAL GROUP	BURT	PAGE 2 OF ____ PAGES

DATE	NR.	PROCEEDINGS
1988		
May 17	16	Notice of Motion; Motion to Amend Petition for Removal Filed Herein March 25, 1988; Memorandum in Support of Motion to Amend Petition for Removal Filed Herein March 25, 1988; Certificate of Service on behalf of deft - referred to Judge Tanner
	17	Supplemental Memorandum in Support of Motion to Amend Petition Re Plaintiffs Liability Under 42 U.S.C. Sections 1983 and 1985 Providing Removal Jurisdiction: Certificate of Service - referred to Judge Tanner
19	18	Opposition to (1) Ex Parte Motion; (2) Request for Rule 11 Sanctions; (3) Motion to Compel Extension with Letter of Credit; Certificate of Service - On Behalf of Defendant
	19	Notice of Hearing; Motion Under Rule 260-3 Etc.; Memorandum in Support of Motion Under Rule 260-3 Re: (1) Proposed Orders; (2) Plaintiffs' Failure to Comply with FRCP Rule 5(a) (3) Plaintiffs' Error in Computing Time Under FRCP Rule 6(a) as it Relates to Local Rule 260-3; Affidavit of William R. Burt; Certificate of Service - On Behalf of Defendant - Referred to Tanner
20	20	ORDER - Defendant's Motions to Amend, for Reconsideration, and for a Stay are DENIED. Plaintiffs' Motion for Rule 11 Sanctions is DENIED. Plaintiffs' Motions to Shorten Time and Compel Extension of a Letter of Credit are MOOT. cc: all counsel **TANNER**
25	21	Motion for Reconsideration of Order of May 20, 1988 Denying Defendant's Motion to Amend; Certificate of Service on behalf of deft
	22	ORDER on Defendant's Motion for Partial Summary Judgment - deft's M/Partial Summary Judgment DENIED in its entirety on behalf of pltfs **JACK E. TANNER**
	23	ORDER on Plaintiffs' Motion to Dismiss Petition for Removal of Civil No. 5300(2) From the Supreme Court of Hawaii to the U.S. Federal District Court for the District of Hawaii - motion GRANTED on behalf of pltfs **JACK E. TANNER** cc: Supreme Court, State of Hawaii
26	24	ORDER - deft's M/Reconsideration DENIED cc: all parties of record **JACK E. TANNER**
	25	Memorandum in Opposition to Defendant's Motion for Reconsideration of Order of May 20, 1988 Denying Defendant's Motion to Amend; Certificate of Service on behalf of pltfs
31	26	**NOTICE OF APPEAL (By Defendant); Certificate of Service**
Jun 6	27	**AMENDED NOTICE OF APPEAL (Amending Notice filed May 31, 1988); Certificate of Service (By Defendant)**

UNITED STATES DISTRICT COURT
Office of the Clerk
District of Hawaii
P. O. Box 50129
300 Ala Moana Blvd.
Honolulu, Hawaii 96850
Walter A.Y.H. Chinn
Clerk
Telephone
(808) 531-1300
FT5 531-1300

May 27, 1987

Clerk
Supreme Court, State of Hawaii
P.O. Box 2560
Hon., HI 96804

Re: Maui Architectural Group, Inc., et al. vs. William Burt
Civil No. 88-00257 ACK
Your number 12259

Dear Sir:

Please be advised that on May 25, 1988, this case was remanded the [sic] the Supreme Court, State of Hawaii. Enclosed is a certified copy of the order.

Sincerely,

WALTER A.Y.H. CHINN, Clerk

by /s/
Deputy Clerk

cc: all parties of record
enc.

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1987

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii corporation, Plaintiffs-Appellees, vs. WILLIAM R. BURT, Defendant-Appellant.	CIVIL NO. 5300(2) NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF (1) JUDGMENT ON APPEAL FILED JUNE 1, 1988; (2) ORDER FILED MAY 13, 1988; (3) ORDER FILED JUNE 15, 1988

FILED
88 AUG -8 AM 8:00
CLERK SUPREME COURT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF (1) JUDGMENT ON APPEAL FILED JUNE 1, 1988; (2) ORDER FILED MAY 13, 1988; AND (3) ORDER FILED JUNE 15, 1988

CERTIFICATE OF SERVICE

WILLIAM R. BURT
480 Hoopalua Drive
Pukalani, Maui, Hawaii 96790

Telephone: (808) 572-1162

Defendant Pro Se

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1987

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC., a Hawaii corporation, Plaintiffs-Appellees, vs. WILLIAM R. BURT, Defendant-Appellant.	CIVIL NO. 5300(2) NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF (1) JUDGMENT ON APPEAL FILED JUNE 1, 1988; (2) ORDER FILED MAY 13, 1988; (3) ORDER FILED JUNE 15, 1988

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF (1) JUDGMENT ON APPEAL FILED JUNE 1, 1988; (2) ORDER FILED MAY 13, 1988; AND (3) ORDER FILED JUNE 15, 1988

TO THE CLERK OF THE SUPREME COURT OF HAWAII

cc: Clerk, Second Circuit Court,
State of Hawaii

Pursuant to 28 U.S.C. 1257(2) and 2101(c) and Rule 10.3 of the United States Supreme Court Rules, Defendant-Appellant hereby gives notice that he is appealing (1) the Judgment on Appeal filed in the Supreme Court of Hawaii on June 1, 1988, and (2) the Order filed May ~~13~~ 31,* 1988, and (3) the Order filed June 15, 1988, to the Supreme Court of the United States.

*Transposition error corrected by Amended Notice of Appeal mailed 9/19/88.

DATED: Pukalani, Hawaii, August 2, 1988.

Respectfully submitted,

WILLIAM R. BURT
Defendant-Appellant Pro Se

Supreme Court, U.S.
FILED
OCT 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-575

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND, aka GROND CONTRACTING, INC., a Hawaii corporation,

Plaintiffs-Appellees,

vs.

WILLIAM R. BURT,

Defendant-Appellant.

APPEAL FROM FINAL JUDGMENT
OF SUPREME COURT, STATE OF HAWAII

PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM FINAL JUDGMENT OF THE SUPREME COURT OF THE STATE OF HAWAII

JAMES KRUEGER 492
2065 Main Street, #102
Wailuku, Hawaii 96793
Tel: (808) 244-7444

Attorney for
Plaintiffs-Appellees

TABLE OF CONTENTS

PAGE	
i	Table of Contents
ii	Table of Authorities
1	Plaintiffs-Appellees' Motion to Dismiss Appeal, or, in the Alternative, Motion to Affirm Final Judgment of the Supreme Court of the State of Hawaii
1	Memorandum of Law in Support of Plaintiffs-Appellees' Motion to Dismiss Appeal, or, in the Alternative, to Affirm Judgment of the Supreme Court of the State of Hawaii
1	Introduction
2	Background
10	Argument
18	Alternatively, the Final Judgment of the Supreme Court of Hawaii must be affirmed
20	Conclusion
22	Affidavit of James Krueger
23	Certificate of Service
	EXHIBITS

TABLE OF AUTHORITIES

1. CASES	PAGES
Abrams v. Van Schaick, 293 U.S. 188, 55 S.Ct. 135, 79 L.Ed. 278 (1934)	15
Baldonado v. California, 366 U.S. 417, 81 S.Ct. 1355, 6 L.Ed.2d 380 (1961)	15
Benz v. New York State Thruway Authority, 369 U.S. 147, 82 S.Ct. 674, 7 L.Ed.2d 634 (1962)	15
Honeyman v. Hanan, 302 U.S. 369, 58 S.Ct. 245, 82 L.Ed. 307 (1937)	13, 14
Live Oak Water Users' Association v. Railroad Commission of California, 269 U.S. 354, 46 S.Ct. 149, 70 L.Ed. 305 (1926)	11, 12, 13
Parker v. McLain, 237 U.S. 469, 35 S.Ct. 632, 59 L.Ed. 1051 (1915)	15, 16, 17, 20
2. United States Statutes	
28 USC 1446	6
3. Rules of the Supreme Court of the United States	
Rule 16, Rules of the Supreme Court	2
4. Hawaii Revised Statutes	
Hawaii Revised Statute Ch. 658	19

PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM FINAL JUDGMENT OF THE SUPREME COURT OF THE STATE OF HAWAII

Plaintiffs-appellees MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND, aka GROND CONTRACTING, INC., a Hawaii corporation (hereinafter collectively referred to as "MAG"), hereby move this Honorable Court for an order dismissing the appeal filed herein by defendant-appellant WILLIAM R. BURT, or, in the alternative, affirming final judgment of the Supreme Court of the State of Hawaii.

MAG submits that BURT has failed to establish sufficient basis for this Court to exercise jurisdiction over the issues raised in his jurisdictional statement and that the final judgment of the Supreme Court of Hawaii validly

determines the rights and obligations of all parties to this action. No substantial federal question is raised by BURT.

This motion is made pursuant to Rule 16 of the Rules of the Supreme Court of the United States, and is based upon the memorandum of law attached hereto, the affidavit of counsel, and attached exhibits, as well as the records and files herein.

DATED: Wailuku, Hawaii, OCT 20 1988.

JAMES KRUEGER
Attorney for Plaintiffs-Appellees

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT OF THE SUPREME COURT OF THE STATE OF HAWAII

I. INTRODUCTION

Dismissal of the appeal is warranted. BURT fails to identify specific grounds in his jurisdictional statement which permit this Court to exercise its jurisdiction over this appeal. No substantial federal question has been raised. BURT's jurisdictional statement fails to identify exactly what federal constitutional rights have been abridged by the Supreme Court of Hawaii, fails to explain the factual basis for alleging denial of due process and equal protection, and fails to establish the nature and extent of the invalidity, if any, of any Hawaii statute in question.

This appeal continues a course of action undertaken by BURT to harass and vex plaintiffs-appellees from the outset. Plaintiffs-appellees have been required to defend frivolous appeals, to incur substantial attorney's fees and costs, and to expend considerable effort and time in order to respond to what has been BURT's abuse of the State and Federal court systems.

II. BACKGROUND

This action originally arose out of a Hawaii state court arbitration proceeding concerning a dispute for fees owed MAG by BURT in connection with the design and construction of a home for BURT in Maui, Hawaii, pursuant to a written architectural and construction contract executed between the parties.

On May 4, 1981, MAG commenced an action in the Second Circuit Court of the State of Hawaii against BURT alleging that valuable work, labor, materials and effort had been provided to BURT who wrongfully refused to pay for such. Thereafter, BURT filed an answer in state court denying the allegations in the complaint and counterclaimed for breach of contract, negligence, fraud, unfair and deceptive practices and other matters.

Pursuant to order dated October 14, 1982, the Second Circuit Court for the State of Hawaii stayed proceedings in the state court and directed that all issues raised by the pleadings between the parties be resolved through arbitration.

Following arbitration hearing in January, 1987, the arbitrators, on March 27, 1987, unanimously concluded that BURT owed MAG the sum of $92,600.00.

Thereafter, MAG moved to confirm the award in state court on April 9, 1987. BURT also moved to vacate or modify the award. MAG's motion was granted; BURT's motion was denied. Reconsideration of said denial, filed by BURT, was also denied. The state court entered its order confirming the arbitration award on May 13, 1987.

On May 19, 1987, BURT moved to amend the pleadings filed earlier in state court and to stay enforcement of the award. BURT's motion was denied.

BURT then appealed the order staying proceedings in the state court pending arbitration, the order

confirming the arbitration award, and the order denying the motion to amend the pleadings, among other matters, to the Supreme Court of the State of Hawaii.

On March 8, 1988, the Supreme Court of the State of Hawaii affirmed the decision of the trial court confirming the arbitration award. A true and correct copy of the memorandum opinion of the Supreme Court of Hawaii is attached hereto as Exhibit "A".

On March 16, 1988, BURT filed a motion for reconsideration of the Hawaii Supreme Court's decision. On March 18, 1988, the Supreme Court of Hawaii summarily denied the motion for reconsideration without argument. A copy of the order denying motion for

reconsideration is attached hereto as Exhibit "B".

On or about March 24, 1988, BURT filed a petition for removal of the proceedings from the Supreme Court of the State of Hawaii to the United States District Court for the District of Hawaii. On or about March 29, 1988, MAG filed a motion to dismiss the petition for removal in the United States District Court for the District of Hawaii. The ground for the motion to dismiss was BURT's failure to comply with 28 U.S.C. §1446. Dismissal was sought because BURT had untimely attempted to remove the action from the state court.

MAG's motion to dismiss petition for removal was granted in its entirety by the Honorable Jack Tanner, a visiting

federal district judge, by order filed in the United States District Court for the District of Hawaii on May 25, 1988, a true and correct copy of which is attached hereto as Exhibit "C".

On April 20, 1988, BURT filed a motion for sanctions pursuant to F.R.C.P. Rule 11 and for partial summary judgment. That motion was dismissed by order filed May 25, 1988 by the Honorable Jack Tanner.

On or about May 13, 1988, BURT filed a motion to amend his petition for removal. That motion was denied by order dated May 20, 1988.

On May 24, 1988, BURT filed a motion for reconsideration of the order of May 20, 1988, denying his motion to amend petition for removal. By order

filed May 26, 1988, Judge Tanner denied BURT's motion for reconsideration.

By letter dated May 27, 1988, Walter A.Y.H. Chinn, the Chief Clerk of the United States District Court for the District of Hawaii, advised the Clerk of the Supreme Court of the State of Hawaii that, as of May 25, 1988, the federal action was remanded to the Supreme Court of Hawaii. A copy of said letter is attached hereto as Exhibit "D".

On June 1, 1988, the Supreme Court of the State of Hawaii, recognizing its jurisdiction to act following remand of the federal action, entered a judgment on appeal affirming the judgment of the state trial court entered on May 13, 1987. A copy of said judgment on appeal is attached hereto as Exhibit "E".

On June 6, 1988, BURT filed an amended notice of appeal in the United States District Court, appealing to the United States Court of Appeals for the Ninth Circuit the following orders: (1) order granting plaintiffs' motion to dismiss petition for removal; (2) order denying defendant's motion for partial summary judgment; (3) order denying defendant's motion to amend; and (4) order denying defendant's motion for reconsideration.

On July 20, 1988, MAG filed their motion to dismiss notice of appeal in the United States Court of Appeals for the Ninth Circuit. MAG's motion to dismiss the appeal for lack of jurisdiction was granted by the U.S. Court of Appeals for the Ninth Circuit pursuant to Order filed July 28, 1988, a

true and correct copy of which is attached hereto as Exhibit "F". Additionally, MAG's request for the imposition of sanctions against BURT was granted by the Ninth Circuit in the July 28, 1988 order.

On August 3, 1988, BURT filed his motion for reconsideration of the July 28, 1988 order. No order on BURT's motion for reconsideration has been entered by the U.S. Court of Appeals as of the date of submission of this motion.

III. ARGUMENT

A. NO SUBSTANTIAL FEDERAL QUESTION IS RAISED FOR THIS COURT TO EXERCISE JURISDICTION OVER BURT'S APPEAL

The jurisdictional statement filed herein by BURT lacks any identification of a substantial federal question. BURT

peripherally argues that his equal protection and due process rights have been violated by the Supreme Court of Hawaii. However, the record is devoid of analysis or reasoning behind BURT's claims.

In Live Oak Water Users' Association v. Railroad Commission of Califorinia, 269 U.S 354, 46 S.Ct. 149, 70 L.Ed. 305 (1926), the United States Supreme Court, in an appeal claiming error made by the Supreme Court of California, dismissed the appeal for lack of substantial federal question. The Court stated, with respect to whether the judgment of the California Supreme Court was reviewable as error:

> The cause is here upon writ of error. Considering the circumstances disclosed by the record, we have no jurisdiction unless it

> affirmatively appears that in the court below there was duly drawn in question the validity of a statute of or an authority exercised under the State because of repugnance to the Constitution, treatise or laws of the United States. 269 U.S. 356

In responding to appellants' claim that the judgment of the Supreme Court of California impaired the obligations of the parties' contracts, that appellants' property had been taken without due process of law and furthermore that appellants had been denied equal protection of the law, the United States Supreme Court rejected such an argument.

> This statement shows no jurisdiction here under the writ of error, although it specifies a Federal question justiciable by certiorari. Something more than a claim of Federal right is necessary; the attack must be upon the validity of the order, not

merely upon the court's judgment. 269 U.S. 357 [Emphasis supplied]

This Court, in Live Oak Association, concluded that plaintiffs in error failed to raised a Federal question at the State court level and that the State court had decided a local question based on local law adequate to support its judgment. Thus, the Court concluded that the California Supreme Court's decision upon a point of local law was sufficient to support its judgment and left no Federal question open for determination. 269 U.S. 359

In Honeyman v. Hanan, 302 U.S. 369, 58 S.Ct. 245, 82 L.Ed. 307 (1937), on a motion to dismiss, the United States Supreme Court dismissed an appeal from the Supreme Court of New York wherein the State's highest court affirmed a

judgment dismissing an action on a bond. In dismissing the appeal, the United States Supreme Court agreed with appellee that want of a jurisdiction existed.

> The Federal Constitution does not undertake to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords a fair opportunity to be heard before the issues are decided. The question of the validity of the State legislation could have been raised in the foreclosure action and brought to this Court in accordance with the applicable rules.
>
> The requirement that the right to a deficiency judgment should be determined in the foreclosure action as against one who is a party to that action raises no substantial Federal question. [Citations omitted] 302 U.S. 378

See also, Benz v. New York State Thruway Authority, 369 U.S. 147, 82 S.Ct. 674, 7 L.Ed.2d 634 (1962); Baldonado v. California, 366 U.S. 417, 81 S.Ct. 1355, 6 L.Ed.2d 380 (1961); Abrams v. Van Schaick, 293 U.S. 188, 55 S.Ct. 135, 79 L.Ed. 278 (1934)

In Parker v. McLain, 237 U.S. 469, 35 S.Ct. 632, 59 L.Ed. 1051 (1915), the United States Supreme Court dismissed an appeal claiming that the Supreme Court of Kansas had erred in entering judgment for plaintiff/appellee. In dismissing the writ of error, the United States Supreme Court concluded that the Federal questions raised before it "were plainly devoid of merit as to afford no basis for a review in this Court." 237 U.S. 474

In addressing the frivolity of appellant's claims, the Court stated:

> Our jurisdiction to review the judgment of the highest court of a State turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision. Judicial code, section 237. And to be effective for this purpose, the assertion of a Federal right must be frivolous or wholly without foundation. It must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of this court invoked merely for purposes of delay. [Citations omitted] 237 U.S. 472

The Parker court determined that appellant's claims were questions of local law and practice and that the decision of the state supreme court on those issues was controlling. The Court found no merit to appellant's contentions that its due process of law

and the equal protection of the laws secured by the Fourteenth Amendment had been contravened. Consequently, the court dismissed appellant's appeal.

This Court, in the instant case, is without sufficent information to conclude that a substantial Federal question is presented by BURT. In his jurisdictional statement, BURT merely contends that his due process and equal protection rights under the Fourteenth Amended have been violated. However, BURT does not identify in what respect such rights have been violated by way of the judgment entered against BURT by the Supreme Court of Hawaii.

Even in spite of giving every benefit of the doubt to BURT, this Court must conclude that his appeal is frivolous and seriously lacks sufficient

merit to warrant the jurisdiction of this Court.

Accordingly, MAG's motion to dismiss appeal should be granted.

B. ALTERNATIVELY, THE FINAL JUDGMENT OF THE SUPREME COURT OF HAWAII MUST BE AFFIRMED

In its memorandum opinion [Exhibit "A"], the Supreme Court of Hawaii affirmed the state trial court's confirmation of an arbitration award in favor of MAG. In so ruling, the Hawaii Supreme Court concluded that state courts should not, as a general rule, overrule an arbitrator's decision where the arbitrator's intervention was bargained for. The Hawaii Supreme Court also concluded that judicial review of arbitration cases is strictly limited because the intent of the parties, in

pursuing arbitration, is to avoid litigation and because the legislative objective in enacting Hawaii Revised Statute Chapter 658 was to restrict and curtail judicial review of arbitration awards.

The Hawaii Supreme Court, upon review of the entire record, concluded there were insufficient grounds to vacate or modify the arbitration award entered in favor of MAG.

An adequate state ground supports the Hawaii Supreme Court's decision.

The original proceeding before the state courts of Hawaii concerned the validity of the arbitration award. BURT has failed to show this Court what issues other than purely local concerns (involving Hawaii law and procedure) are raised before this Court.

The United States Supreme Court has already addressed, in Park v. McLain, supra, that where matters of purely local law and practice are raised, and no substantial Federal question is raised, that it would not have jurisdiction to entertain an appeal under those circumstances. The same situation applies here. No substantial Federal question has been raised by BURT.

Accordingly, this Court is asked to affirm the judgment of the Supreme Court of Hawaii.

CONCLUSION

Based on the foregoing argument, and upon the strength of the authority cited herein, this Court is asked to dismiss the appeal filed herein by BURT and/or, in the alternative, affirm the

final judgment of the Supreme Court of the State of Hawaii.

DATED: Wailuku, Hawaii, OCT 29 1988.

JAMES KRUEGER
Attorney for
Plaintiffs-Appellees

AFFIDAVIT OF JAMES KRUEGER

STATE OF HAWAII)
) SS.
COUNTY OF MAUI)

JAMES KRUEGER, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law in the State of Hawaii and am the attorney representing plaintiffs-appellees herein.

2. That Exhibits "A" through "F" attached hereto are true and correct copies of the originals.

FURTHER AFFIANT SAYETH NAUGHT.

JAMES KRUEGER

Subscribed and sworn to before me
this 25th day of October 1988.

Notary Public, State of Hawaii
My commission expires: 5/1/91

CERTIFICATE OF SERVICE

I, JAMES KRUEGER, attorney for plaintiffs-appellees herein, hereby certify that a true and correct copy of plaintiffs-appellees' motion to dismiss appeal, or, in the alternative, motion to affirm final judgment of the Supreme Court of the State of Hawaii, was duly served by mail, by deposting said document in a U.S. post office mailbox, first-class, postage pre-paid, addressed to WILLIAM R. BURT, 480 Hoopalua Drive, Pukalani, Hawaii 96768, on October 29, 1988, pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States.

DATED: Wailuku, Hawaii, OCT 29 1988

JAMES KRUEGER
Attorney for
Plaintiffs-Appellees

JAMES KRUEGER
244-7444
81-01

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND CONTRACTING, aka Grond Contracting, Inc., a Hawaii corporation,	CIV. NO. 5300(2)
Plaintiffs-Appellees,	APPEAL FROM: (1) ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED OCTOBER 14, 1982; (2) ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; (3) ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT AMERICAN ARBITRATION AWARD, FILED JUNE 1, 1987; (4) ORDER DENYING DEFENDANT'S MOTION FOR DISQUALIFICATION AND DENYING DEFENDANT'S MOTION TO AMEND PLEADINGS TO INCLUDE ADDITIONAL COUNTERCLAIM UNDER RULES 59(a) and 59(e) OF THE HAWAII RULES OF CIVIL PROCEDURE AND STAY UNDER SECTION 641-3(c) OF THE HAWAII REVISED STATUTES, FILED JUNE 24, 1987
vs.	
WILLIAM R. BURT,	
Defendant-Appellant.	SECOND CIRCUIT COURT
	HONORABLE ARTHUR T. UEOKA and RICHARD R. KOMO, JUDGES

MEMORANDUM OPINION

Defendant-appellant William R. Burt appeals from the order of the Circuit Court of the Second Circuit granting the motion for a stay of proceedings pending arbitration filed by

EXHIBIT A

Plaintiffs-appellees Maui Architectural Group, Inc. (MAG) and Konrad Grond Contracting (Grond) and from the subsequent order of the court confirming the arbitration award. [1/] The defendant-appellant argues, inter alia, that the circuit court should not have entertained the motion to stay proceedings in view of the plaintiffs-appellees' default in seeking arbitration, and the plaintiffs-appellees argue the defendant-appellant's notice of appeal was untimely. We resolve these threshold questions in favor of arbitrability and appealability; and after reviewing the record we affirm the circuit court's confirmation of the award.

I.

On December 19, 1978, Burt entered into a contract with MAG for the preparation of architectural plans for a "residence and garage" in the Kula 200 subdivision, Kula, Maui, agreeing to pay MAG twelve percent of the construction costs for its services. On July 9, 1979, Burt entered into two separate construction contracts with Grond dated July 9, 1979 and July 10, 1979. [2/] Under the contract dated July 9, 1979, Burt "agree[d] to pay [Grond] the sum of $192,000.00." The contract dated July 10, 1979, however, provided that Burt would "pay [Grond] the sum of material

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1/ More specifically, Burt appeals from the following: (1) Order Granting Plaintiff's Motion to Stay Proceedings Pending Arbitration, filed October 14, 1982; (2) Order Confirming American Arbitration Award; Entry of Judgment and Judgment, filed May 13, 1987; (3) Order Denying Motion for Reconsideration of Denial of Defendant's Motion Under Section 658-8, H.R.S., to Vacate, Modify or Correct American Arbitration Award, filed June 1, 1987; and (4) Order Denying Defendant's Motion for Disqualification and Denying Defendant's Motion to Amend Pleadings, filed June 24, 1987.

2/ The fact that two contracts were executed is of no consequence in this appeal.

 EXHIBIT A-2

and labor plus 10% profit." Paragraph 9.1 of the contract between Burt and MAG read:

> All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.

The contracts between Burt and Grond also provided that disputes arising thereunder were "subject to arbitration."

Grond constructed a home for Burt "[p]ursuant to [MAG's] drawings, plans, and specifications." It submitted a bill for $253,928.85, but Burt paid the contractor only $171,657.64. On May 4, 1981 the plaintiffs filed a complaint against Burt, alleging they "provided valuable work, labor, materials and effort to" Burt who "wrongful[ly] refus[ed] to pay." They prayed for "such sums of money and damages as are owed . . . to the plaintiffs."

Burt responded on May 27, 1981, denying plaintiffs' allegation that he wrongfully refused to pay and asserting a multitude of defenses. He also brought a counterclaim against the plaintiffs, alleging causes of action for "Breach of Contract by Architect," "Negligence of Architect," "Negligent Infliction of Mental Distress by Architect," "Breach of Contract by Contractor," "Negligent Construction by Contractor," "Fraud and Conspiracy of Architect and Contractor," "Unfair and Deceptive Acts or Practices in the Conduct of a Trade or Business by Architect and Contractor," and "Willful Misconduct and Punitive Damages" [3/] and

---

3/ Burt's counterclaim alleged, inter alia, that MAG "fail[ed] to prepare change orders for alterations in construction of [his] home," "failed to timely advise [him] of [the] acts of [Grond] and cost overruns by

EXHIBIT A-3

seeking special, general, and punitive damages, fees and costs, and "such other and further relief as the [c]ourt may deem to be just."

Plaintiffs moved for a stay of proceedings pending arbitration on July 8, 1981. Claiming a firm trial date was not available "until April or May . . . next year," they maintained that "this matter [could be] resolved in the next few months" by arbitration. Burt argued in opposition that the plaintiffs' commencement of "legal action without in any way insisting upon their right to arbitration or taking any steps to preserve that right[]" and their claim of such right "after a delay of fourteen months . . . preclude [p]laintiffs' attempt to enforce arbitration." The motion was heard and a stay was orally granted on September 30, 1982. Burt sought permission to seek interlocutory appellate review of the stay order, but his request was denied. And on October 14, 1982 the circuit court entered an order staying proceedings in court and directing that "all issues raised by the pleadings herein to date" be resolved through arbitration.

Arbitration commenced on January 5, 1987. Three days of hearings followed on January 6, 7, and 19, 1987. On March 27,

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3/ (Continued).

[Grond]," and that MAG's "negligent conduct has caused [him] great mental distress." Grond, Burt averred, "fail[ed] to construct [his] home in conformity with the contract plans" and "negligently performed the construction work." Furthermore, Burt contended "[p]laintiffs acted in concert and conspired together in the misrepresentation of material facts concerning the progress and cost of the construction of [his] home"; such actions "constitute unfair and deceptive acts in the conduct of a trade or business," and the breach of contract by plaintiffs was "willful and . . . for the purpose of economically oppressing . . . and cheating him."

EXHIBIT A-4

1987, the arbitrators, "having duly heard the proofs and allegations of the parties," concluded Burt owed the contractor $73,275 more than he paid plus $8,000 in attorney's fees. The arbitrators also concluded Burt owed MAG $11,325.

Plaintiffs moved to confirm the award on April 9, 1987. Two weeks later, Burt moved to have the award vacated or modified. The plaintiffs' motion was granted; Burt's was denied. Reconsideration of the denial of the motion to vacate or modify the award was denied too. On May 13, 1987, the trial court after "having considered the papers and pleadings on file" entered the written order confirming the arbitration award. On May 19, 1987, Burt moved to amend the pleadings filed earlier in the court and to stay enforcement of the award. The court denied the motion and this appeal followed.

II.

We begin our analysis of the issues posed on appeal by considering whether the appeal from the circuit court's order granting plaintiffs' stay of proceedings pending arbitration is timely. Citing Barthrop v. Kona Coffee Co., 10 Haw. 398, 401 (1896); Mackenzie v. Choi, 47 Haw. 298, 302-03, 387 P.2d 475, 477-78 (1963); Gomes v. Heirs of Kauwe, 52 Haw. 126, 126-27, 472 P.2d 119, 119-20 (1970); and Association of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. ____, ____, 705 P.2d 28, 35 (1985), the plaintiffs argue the order entered on October 14, 1982 was a final and appealable order for which leave to appeal was not necessary. And since Burt failed to file a notice of appeal from the entry of the order within thirty days, they

EXHIBIT A-5

contend the order is now not appealable. [4/] We cannot agree. [5/]

In Swinerton we said "orders granting stays and compelling arbitration are appealable." Id. But on October 14, 1982, when the trial court stayed proceedings pending arbitration, the prevailing rule as expressed in Pfaeltzer v. Patterson, 49 Haw. 59, 60, 410 P.2d 974, 974 (1966), was that an order staying proceedings pending arbitration "being interlocutory, an appeal therefrom can be had only upon the allowance of the circuit judge." Id. Plaintiffs' reliance on Swinerton is misplaced since the opinion was not issued until 1985. Hence, Burt correctly sought permission for an interlocutory appeal when plaintiffs' motion was granted. Having been denied leave then, his appeal after the confirmation of arbitration award, if timely, covered an appeal from the earlier order.

III.

Turning to the issues raised by Burt, we first address his contention that plaintiffs' "conduct was [in]consistent with a reliance upon the arbitration provisions in the contracts" and plaintiffs therefore "waived their right to enforce the arbitration provisions."

4/ Hawaii Rules of Civil Procedure (HRCP) Rule 72(b) reads: "[N]otice of appeal shall be filed in the circuit court within 30 days after the person desiring to appeal is notified of the rendering or entry of the decision or order, or of the action taken, in the manner provided by statute."

5/ The plaintiffs do not argue in their brief that the defendant's appeal was untimely under our ruling in Salud v. Financial Security Ins. Co., 69 Haw. ___, 745 P.2d 290 (1987). An application of the holding there to the facts here would result in the conclusion that the defendant's appeal to this court was untimely. But since the opinion in Salud was only issued on November 10, 1987, we choose not to declare that we lack jurisdiction to entertain the appeal.

EXHIBIT A-6

A.

Summarizing the precepts applicable when waiver is an issue, we said in Swinerton that "'the proclaimed public policy . . . to encourage arbitration as a means of settling differences' preclude a court from lightly inferring a waiver of a right to arbitration or a default in proceeding thereto." Swinerton, 68 Haw. at ____, 705 P.2d at 35 (quoting Gregg Kendall & Associates v. Kauhi, 53 Haw. 88, 93, 488 P.2d 136, 140 (1971)). "Waiver is generally defined as an 'intentional relinquishment of a known right,' a 'voluntary relinquishment of some rights,' and 'the relinquishment or refusal to use a right.' State Savings & Loan Association v. Kauaian Development Company, 50 Haw. 540, 557, 445 P.2d 109, 121 (1968); Robinson v. McWayne, 35 Haw. 689, 719 (1940)." Anderson v. Anderson, 59 Haw. 575, 586-87, 585 P.2d 938, 945 (1978) (quoted in Swinerton, 68 Haw. at ____, 705 P.2d at 36). Though we concluded there was no waiver of a right to arbitration in Swinerton, we indicated there would have been one "if the [plaintiffs'] conduct [could have been] deemed inconsistent with a reliance on the contract." Id. at ____, 705 P.2d at 36. But as we stated earlier, Swinerton was not controlling when the plaintiffs moved for a stay pending arbitration. And as we did earlier in deciding the defendant's appeal was a timely one, we choose to exercise lenity in applying a rule enunciated in an opinion issued after the circuit court acted.

B.

Having decided in favor of arbitrability, we turn to Burt's contention that the award should be vacated because the

EXHIBIT A-1

arbitrators were guilty of misconduct.

"[J]udicial review in arbitration cases is strictly limited, since 'extensive judicial review of arbitration awards would frustrate the intent of the parties to avoid litigation and would also nullify the legislative objective in the enactment of the Arbitration and Awards statute [HRS Ch. 658].'" University of Hawaii Professional Assembly ex rel. Daeufer v. University of Hawaii, 66 Haw. 214, 224, 659 P.2d 720, 727 (1983) (quoting Mars Constructors, Inc. v. Tropical Enterprises, Ltd., 51 Haw. 332, 335, 460 P.2d 317, 319 (1969)). Accordingly, "only when one of the grounds specified in [Hawaii Revised Statutes (HRS)] §§ 658-9 [6/] and 658-10 [7/] is met can an arbitrator's award be

---

6/ HRS § 658-9 (1985) reads in relevant part:

> **Vacating award.** In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:
>
> (1) Where the award was procured by corruption, fraud, or undue means;
>
> (2) Where there was evident partiality or corruption in the arbitrators, or any of them;
>
> (3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced;
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.

7/ HRS § 658-10, in pertinent part, reads:

> **Modifying or correcting award.** In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:

EXHIBIT A-8

vacated or modified." Id. at 224-25, 659 P.2d at 727-28 (citing Mars, 51 Haw. at 336, 460 P.2d at 319-20) (footnotes omitted)). "Thus, the fact that an arbitrator may err in applying the law, finding facts, or in construing the contract, or enters an award that is contrary to the evidence adduced, is insufficient grounds for judicial reversal." Id. at 225, 659 P.2d at 728 (citing Kim v. Mel Cummins Building Contractor, Inc., 57 Haw. 186, 187-88, 552 P.2d 1117, 1118 (1976)). Indeed, "'[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.'" Id. at 225-26, 659 P.2d at 728 (footnote omitted) (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)); see also United Paperworkers International Union v. Misco, Inc., ____ U.S. ____, ____, 108 S. Ct. 364, 370 (1987).

1/ (Continued).

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award;

(2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties.

EXHIBIT A-9

Based on our review of the record, we cannot conclude there were sufficient grounds to vacate or modify the arbitration award. [8/]

Affirmed.

DATED: Honolulu, Hawaii, March 9, 1999.

Shackley F. Raffetto (Jaress & Raffetto, of counsel) for appellant

James Krueger (Magali V. Richter with him on the brief) for appellees

---

8/ We also find the defendant's argument that he should have been allowed to amend his pleadings is totally lacking in merit.

EXHIBIT A-10

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

FILED
1988 MAR 18 PM 1:55

MAUI ARCHITECTURAL GROUP, Inc., a Hawaii corporation, KONRAD GROND CONTRACTING, aka Grond Contracting, Inc., a Hawaii corporation, Plaintiffs-Appellees, vs. WILLIAM R. BURT, Defendant-Appellant.	CIV. NO. 5300(2) APPEAL FROM: (1) ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED OCTOBER 14, 1982; (2) ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; (3) ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT AMERICAN ARBITRATION AWARD, FILED JUNE 1, 1987; (4) ORDER DENYING DEFENDANT'S MOTION FOR DISQUALIFICATION AND DENYING DEFENDANT'S MOTION TO AMEND PLEADINGS TO INCLUDE ADDITIONAL COUNTERCLAIM UNDER RULES 59(a) and 59(e) OF THE HAWAII RULES OF CIVIL PROCEDURE AND STAY UNDER SECTION 641-3(c) OF THE HAWAII REVISED STATUTES, FILED JUNE 24, 1987 SECOND CIRCUIT COURT HONORABLE ARTHUR T. UEOKA and RICHARD R. KOMO, JUDGES

ORDER DENYING MOTION FOR RECONSIDERATION

The Motion for Reconsideration filed on March 16, 1988

EXHIBIT B

is denied without argument.

DATED: Honolulu, Hawaii, March 19, 1999.

Shackley F. Raffetto (Jaress & Raffetto, of counsel) on the motion for appellant

EXHIBIT B-2

LODGED
MAY 18 1988
CLERK, U. S. DISTRICT COURT
DISTRICT OF HAWAII

JAMES KRUEGER
Attorney at Law
A Law Corporation

JAMES KRUEGER 492
KEVIN H.S. YUEN 3509
2065 Main Street
Post Office Box T
Wailuku, Maui, Hawaii 96793

Telephone: 244-7444 (Maui)
536-7474 (Honolulu)

Attorneys for Plaintiffs

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
MAY 25 1988
at ___ o'clock and ___ min. ___ M.
WALTER A. Y. H. CHINN, CLERK

81-01 KHSY:SOS:jb

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI ARCHITECTURAL GROUP, INC., a Hawaii Corporation, KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC. A Hawaii Corporation,	Civil No. 88-00257ACK No. 12259, Supreme Court of Hawaii, No. 5300(2), Second Circuit Court
Plaintiffs,	ORDER ON PLAINTIFFS' MOTION TO DISMISS PETITION FOR REMOVAL OF CIVIL NO. 5300(2) FROM THE SUPREME COURT OF HAWAII TO THE U.S. FEDERAL DISTRICT COURT FOR THE DISTRICT OF HAWAII
vs.	
WILLIAM R. BURT,	
Defendant.	

ORDER ON PLAINTIFFS' MOTION TO DISMISS
PETITION FOR REMOVAL OF CIVIL NO. 5300(2)
FROM THE SUPREME COURT OF HAWAII TO THE U.S.
FEDERAL DISTRICT COURT FOR THE DISTRICT OF HAWAII

Plaintiffs' motion to dismiss petition for removal of Civil No. 5300(2) from the Supreme Court of Hawaii to the U.S. Federal District Court for the

EXHIBIT C

District of Hawaii came on for hearing before the Honorable Jack Tanner on May 9, 1988. The parties having appeared thereat, and the court having had the benefit of reviewing the record and files herein and listening to the presentation of counsel,

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' motion to dismiss petition for removal of Civil No. 5300(2) from the Supreme Court of Hawaii to the U.S. Federal District Court for the District of Hawaii is hereby granted in its entirety.

DATED AT Honolulu, Hawaii May 27, 1988.

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

JAMES KRUEGER
KEVIN H.S. YUEN

WILLIAM R. BURT

ORDER ON PLAINTIFFS' MOTION TO DISMISS PETITION FOR REMOVAL OF CIVIL NO. 5300(2) FROM THE SUPREME COURT OF THE STATE OF HAWAII TO THE U.S. FEDERAL DISTRICT COURT FOR THE DISTRICT OF HAWAII
MAUI ARCHITECTURAL GROUP v. BURT
Civil No. 88-025?ACK, United States District Court

EXHIBIT C-2

NITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF HAWAII
P O BOX 50129
300 ALA MOANA BLVD
HONOLULU HAWAII 96850

WALTER A.Y.H. CHINN
CLERK

TELEPHONE
(808) 541-1300
FTS 551-1300

May 27, 1988

Clerk
Supreme Court, State of Hawaii
P.O. Box 2560
Hon., HI 96804

Re: Maui Architectural Group, Inc., et al. vs. William Burt
Civil No. 88-00257 ACK
Your number 12259

Dear Sir:

Please be advised that on May 25, 1988, this case was remanded the the Supreme Court, State of Hawaii. Enclosed is a certified copy of the orcer.

Sincereiy,

WALTER A.Y.H. CHINN, Clerk

by _____
Deputy Clerk

cc: all parties of record
enc.

Please acanowledge receipt on the copy of this letter and return.

Dated: _____ By: _____

EXHIBIT D

COPY

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1987

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND CONTRACTING, aka Grond Contracting, Inc., a Hawaii corporation, Plaintiffs-Appellees, vs. WILLIAM R. BURT, Defendant-Appellant.	NO. 5300(2) APPEAL FROM [1] ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED OCTOBER 14, 1982; [2] ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; [3] ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT AMERICAN ARBITRATION AWARD, FILED JUNE 1, 1987; [4] ORDER DENYING DEFENDANT'S MOTION FOR DISQUALIFICATION AND DENYING DEFENDANT'S MOTION TO AMEND PLEADINGS TO INCLUDE ADDITIONAL COUNTERCLAIM UNDER RULES 59(a) AND 59(e) OF THE HAWAII RULES OF CIVIL PROCEDURE AND STAY UNDER SECTION 641-1(c) OF THE HAWAII REVISED STATUTES, FILED JUNE 24, 1987

EXHIBIT E

)
) SECOND CIRCUIT COURT
)
) HONORABLE ARTHUR T. UEOKA
) HONORABLE RICHARD R. KOMO
) Judges
)

JUDGMENT ON APPEAL

and

CERTIFICATE OF SERVICE

JAMES KRUEGER
Attorney at Law
A Law Corporation

JAMES KRUEGER 492
TIMOTHY P. McNULTY 4324
MAGALI V. PICHTER 4411
KEVIN H.S. YUEN 3509
2065 Main Street
P. O. Box T
Wailuku, Maui, HI 96793

Tel: 244-7444 (Maui)
536-7474 (Honolulu)

Attorneys for plaintiffs-appellees
81-00001 JK/SOS:jkw

E-2

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1987

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND CONTRACTING, aka Grond Contracting, Inc., a Hawaii corporation, Plaintiffs-Appellees, vs. WILLIAM R. BURT, Defendant-Appellant.	NO. 5300(2) APPEAL FROM [1] ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED OCTOBER 14, 1982; [2] ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; [3] ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT AMERICAN ARBITRATION AWARD, FILED JUNE 1, 1987; [4] ORDER DENYING DEFENDANT'S MOTION FOR DISQUALIFICATION AND DENYING DEFENDANT'S MOTION TO AMEND PLEADINGS TO INCLUDE ADDITIONAL COUNTERCLAIM UNDER RULES 59(a) AND 59(e) OF THE HAWAII RULES OF CIVIL PROCEDURE AND STAY UNDER SECTION 641-3(c) OF THE HAWAII REVISED STATUTES, FILED JUNE 24, 1987

EXHIBIT E-3

)
) SECOND CIRCUIT COURT
)
) HONORABLE ARTHUR T. UEOKA
) HONORABLE RICHARD R. KOMO
) Judges
)

JUDGMENT ON APPEAL

Pursuant to Memorandum Opinion of the Supreme Court, State of Hawaii, entered herein on March 8, 1988, the Judgment of the lower court entered on May 13, 1987 is affirmed.

DATED: Honolulu, Hawaii, JUN 1988

BY THE COURT:

Eugene L Sakada
Of Clerk

APPROVED:

Edward H. Nakamura
Associate Justice

EXHIBIT E-4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Judgment on Appeal was provided by United States mail, this 22th day of March, 1988, to:

Shackley F. Raffetto, Esquire
Jaress & Raffetto
Attorneys at Law
2170-B Main Street
Suite 12
P.O. Box 1147
Wailuku, Maui, HI 96793
Telephone: 244-9007

Attorneys for defendant-appellant

DATED AT Wailuku, Maui, Hawaii, MAR 28 1988

JAMES KRUEGER
TIMOTHY P. McNULTY
MAGALI V. RICHTER
KEVIN H.S. YUEN

Attorneys for plaintiffs-appellees

EXHIBIT E-5

FILED

JUL 28 1988

CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, et al.,	)	No. 88-2806
Plaintiffs-Appellees,	)	DC# CV-88-257-ACK Hawaii
vs.	)	
WILLIAM R. BURT,	)	ORDER
Defendant-Appellant.	)	

Before: ALARCON, POOLE and O'SCANNLAIN, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is granted. See 28 U.S.C. § 1447(d). Appellant's emergency motion for a temporary restraining order is denied as moot.

Appellees' request for the imposition of sanctions against appellant is granted. See Fed. R. App. P. 38. Appellees are awarded their attorney fees and single costs incurred in moving to dismiss this appeal and in opposing appellant's emergency motion. Within 14 days from the entry of this order, appellees shall file a statement of the costs and fees incurred.

Misc. Memos 7/28/88

EXHIBIT F